Office-Supreme Court, U.S.
FILED
APR 23 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1467

WALL STREET TRANSCRIPT CORPORATION
By Richard A. Holman,
Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SAMUEL N. GREENSPOON
Counsel for Petitioner
201 East 42nd Street
New York, N. Y. 10017
212-867-0606

Of Counsel
SAMUEL N. GREENSPOON
EATON, VANWINKLE & GREENSPOON

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Wall Street Transcript Corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled proceeding on February 2, 1970.

Opinions Below

The opinions of the Court of Appeals, Second Circuit, appended hereto, are not as yet reported. The opinion of the United States District Court for the Southern District of New York, appended hereto, is reported in 294 F. Supp. 298.

Jurisdiction

The judgment of the Court of Appeals was entered on February 2, 1970. Appendix A, *infra*. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

1. May Congress under the First Amendment constitutionally license the press and impose prior restraints upon its expression to curb potential abusive practices of the press?

2. Whether the Court of Appeals rendered the Investment Advisers Act of 1940 ("Act")—a licensing and penal statute which prohibits and makes criminal the use of the mails and facilities of interstate commerce—unconstitutional on its face, by exposing every member of the press publishing financial and business information to the burden of open ended investigation under the Act?

3. Whether in the light of the First Amendment and the language of the Act, the Court of Appeals erred in construing the Act and the exclusions therefrom so as to hold that the Act applies to press and that Congress has authorized investigations of the press thereunder?

4. When First Amendment rights of the press are involved in an agency investigation under an Act which ends in licensing and restraint on expression, should the Courts make the initial determination of the jurisdiction of the agency especially where, as here, the agency con-

ceded it was unable to state the factors upon which its determination might be based?

5. Where the subpoena *duces tecum* issued by the SEC, under this licensing statute, seeks to inquire into the sources of the publication's news, the names of its subscribers, and the content of the news published, without any showing of probable cause therefore or that the documents sought are relevant and germane to any lawful inquiry, does the subpoena *duces tecum* violate the publication's First or Fourth Amendment rights?

Constitutional Provisions and Statutes Involved

The pertinent constitutional and statutory provisions are set forth in Appendix B, *infra* (pp. 47a-58a).

Statement*

1) This is a proceeding commenced in the United States District Court for the Southern District of New York by the SEC to enforce an administrative subpoena *duces tecum* issued by it on March 18, 1968 pursuant to its order dated July 27, 1967, to investigate the petitioner under Section 209(a) of the Act, 15 U. S. C. §80b-9(a). The subpoena demanded production of all documents relating to petitioner's news-gathering facilities, sales facilities, subscribers and prospective subscribers and all correspondence therewith (17a-18a, 79a-80a). The subject to be investigated was failure of the petitioner to register with and be licensed by the SEC under Section 203 of the Act by reason of its publication since June 1963 of a

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* Figures in parenthesis (——a) refer to pages in the SEC's appendix to its brief in the Court below unless otherwise indicated; pages in the SEC's brief below are referred to as SEC br. p.——).

weekly newspaper called The Wall Street Transcript ("Transcript") (15a-16a; SEC br. pp. 2, 10, 12, 13, 14).

The District Court had jurisdiction over this proceeding under 15 U. S. C. Sec. 80b-9(c). The District Court denied enforcement of the subpoena *duces tecum*. The majority of the Court of Appeals reversed and remanded and granted enforcement. The minority concurred only in a remand to permit the SEC to adduce proof to satisfy the District Court that its aid is required.

2) The Transcript commenced publication in June 1963 (90a). It is published every Monday and is distributed through the mails and at newsstands (92a). As of September 17, 1968 (100a), two hundred and seventy-six consecutive weekly issues had been published and more than 40,000,000 words had been reported (90a). The Transcript confines its content to reporting that which others have said, written, or done, and to editorials, primarily with respect to business or financial matters (85a-86a). Not a single complaint about the Transcript has ever been received by the SEC (Appendix A, pp. 2a-3a, 33a).

The Transcript is copyrighted as a newspaper (92a). It has a second-class postage permit from the United States Post Office Department (92a). The Transcript made application for its entry as second-class mail, which embraces newspapers (39 U. S. C. §4351), on the prescribed form and the Classification Division of the Post Office determined that the Transcript was entitled to "Newspaper Treatment" because it met this test (92a-93a):

> "Newspapers must be published once each week or more frequently and feature principally news of interest to the general public. . . . (Sec. 126, 4-41, Chapter 1, Postal Manual)"

The Transcript now has about 8,000 subscribers, including universities, libraries, corporations, individuals, trust companies, accounting firms, mutual funds, brokers, insurance companies and government agencies (90a-91a).

Between the date of issuance of the order, July 27, 1967, and the date of issuance of the subpoena *duces tecum,* March 18, 1968, Commissioner Wheat of the SEC wrote to petitioner as follows (102a):

> "Thank you for a copy of the February 19, Wall Street Transcript. I was particularly glad to have some of the speeches which I did not hear, such as the very perceptive one by Bill Moyers. They were all presented in a very professional way in the Transcript."

Even prior to the issuance of the SEC order, on May 27, 1966 Commissioner Wheat wrote to the petitioner in part as follows:

> " 'I had the pleasure of reading one of the issues of the Transcript during a very brief stay at the Conference and found it *extremely informative*' (Emphasis supplied) (91a-92a, 103a)."

Indeed, for several years the SEC subscribed to the Transcript. Its order form for the Transcript accurately described it as a "newspaper" (91a, 101a).

3) The petitioner appeared by its president, Mr. Richard A. Holman, pursuant to the subpoena *duces tecum,* and on advice of counsel refused to produce any documents or to answer any questions other than to state his name, addresses and telephone numbers (39a, 59a, 67a, 68a). The petitioner asserted as the basis for its said refusal that the SEC investigation was improper, illegal and without jurisdictional basis under the United States Constitution and the Act itself (40a, 43a, 45a, 48a, 49a-50a,

53a, 62a-63a, 64a-65a). Both the First and Fourth Amendments were asserted as bars to the investigation (49a, 63a-64a).

The SEC then commenced this proceeding about September 4, 1968 for enforcement of its subpoena *duces tecum* (5a-6a). Annexed to the SEC's notice of motion was a petition verified by the Regional Administrator (7a-14a); the SEC's order, dated July 27, 1967 (15a-16a); the subpoena *duces tecum* dated March 18, 1968, with proof of service (17a-19a); the exhibits marked on the hearing (20a-28a); and the transcript of the hearing (29a-71a). No copy of the Transcript was annexed or handed up by the SEC (5a-71a).

The SEC's order stated that its staff has reported that the petitioner is utilizing the mails in connection with the Transcript (16a); that the Transcript is an investment adviser under the Act (16a); that petitioner has failed to register with the SEC (16a); that the SEC had considered the staff report and deemed such acts and practices, if true, to be in possible violation of the Act since petitioner had not registered with and been licensed by the SEC under Section 203 of the Act (16a).

The staff report was not produced by the SEC; and the SEC admitted that it did not possess any evidence that the Transcript is engaged in any practices which would subject it to the Act or to licensing (Appendix A, *infra* pp. 16a, 33a); and further the SEC was unable to suggest any factors upon which its judgment with respect thereto was or should be based (Appendix A, *infra,* p. 24a).

4) The District Judge carefully analyzed the various issues of the Transcript handed up by petitioner on oral argument, and found (Appendix A, *infra,* pp. 39a-40a):

> "A typical issue of the Transcript includes reports issued by brokerage houses on various se-

curities, news of offerings of bonds and stocks, speeches made by corporate, financial and government personages, news concerning name changes of companies, news concerning executive promotions and transfers, news concerning mergers and acquisitions and editorials on various subjects with, it would appear, principal emphasis on financial and economic matters."

To the extent that the Transcript quotes reports of brokers, it indicates the name of the brokerage house (and analyst) which issued the reports on the securities (88a) and publishes these reports in their full original text (40a).

In addition, as the Courts found, the Transcript disclaims any connection with or advocacy of the reports (Appendix A, *infra,* pp. 8a, 40a-41a), as follows:

> "The Wall Street Transcript publishes security reports and comments of others in their entirety as a service to subscribers. The Wall Street Transcript does not in any way endorse or guarantee the accuracy or reliability of any of the information, statements or opinions expressed in the reports by the firms who have written them." (87a)

It is these broker reports, reported in *haec verba* in the Transcript, which are publicly disseminated by brokers, and the index thereof, to which the majority alluded in remarking that the Transcript does not necessarily fit within the exclusion under the Act for "bona fide" newspapers (Appendix A, *infra,* p. 12a). The Transcript is not the only member of the press which publishes such reports and indeed practically every newspaper publishes them (87a). To say that the Transcript

could be transmuted from a newspaper to an investment adviser because it reports such previously disseminated matter is to say that West Publishing Company practices law because it publishes opinions of the Courts (88a).

These broker reports treat of many subjects in addition to securities. Political, social and economic problems of major consequence are discussed at length therein.

The District Judge, on the basis of overwhelming and unrebutted evidence and facts, found that:

> "the Transcript appears to be a bona fide 'financial publication of general and regular circulation'. Moreover, the Transcript has all the usual indicia of a newspaper as that term is generally understood by the public and is normally used to indicate an entity protected by the free press clause of the First Amendment." (Appendix A, pp. 42a-43a).

5) The Court of Appeals did not reject the finding that the Transcript is an entity protected by the free press clause of the First Amendment. To the contrary, the majority said that was not enough to bar licensing (Appendix A, *infra,* p. 14a), and that the Transcript must also show that it is a bona fide newspaper or financial publication excluded under the Act (Appendix A, *infra,* p. 14a). The majority said (Appendix, *infra,* p. 11a) "The determination of whether or not a given publication fits within this exclusion must depend upon the nature of its practices . . . ." The majority, then concluded:

> "Since the Transcript's practices had not yet been explored, neither this court nor the district court is presently in an appropriate position to attempt to draw such a line." (Appendix A, *infra,* p. 15a).

The practices to be explored are presumably whether or not the Transcript is paid for publishing certain articles or for positioning them or whether or not it serves third party financial interests (Appendix A, *infra*, pp. 12a-13a). No one has suggested that the Transcript is so paid or does serve any such financial interests (Appendix A, *infra*, p. 16a). Indeed, the contrary is true (85a-86a; Appendix A, *infra*, p. 12a).

This contemplated investigation has a chilling effect upon the Transcript and its constitutional rights. It will frighten away and dissuade subscribers and advertisers; no publication can avoid damage both financial and to its reputation in the face of such investigation (75a). The investigation will destroy the continuity of the Transcript by impairing its news sources (94a-95a, 75a-76a).

The District Judge found all of the classic evils of repression of a free press present in the proposed investigation (Appendix A, *infra*, p. 38a):

> "In the case at bar, I reason that the Commission's broad inquiry under the Act can end only in restraint of expression by the Wall Street Transcript. If a newspaper operates under the threat of disclosure to a government agency of its news sources and subscribers' identities, for example, it will be cautious, to say the least, about what it prints. Its 'caution' will only increase when its advertisers become apprehensive and its subscribers become intimidated by government scrutiny. This is classic restraint of expression which needs no further elaboration here."

The majority below appear to have concurred that the investigation will chill the Transcript's First Amendment rights. However, the majority reasoned that other forms of investigation might have an even greater chilling ef-

fect upon the Transcript than this investigation (Appendix A, *infra,* p. 19a).

Four Judges have passed upon the issues in this case. District Judge Tyler ruled that the Transcript is a bona fide publication excluded under the Act and that it is also an entity protected from licensing by the First Amendment (Appendix A, *infra,* pp. 42a-43a). Judge Tyler further ruled that in view of the chilling effect of any investigation, it was the duty of the Court to ascertain the SEC's jurisdiction and having ascertained that it had none, Judge Tyler refused to enforce the subpoena *duces tecum* (Appendix A, *infra,* pp. 44a-45a).

Circuit Judge Danaher, concurring only in the remand and not in the reversal, noted that this case presents "an issue of first impression" (Appendix A, *infra,* p. 20a).[1] Judge Danaher agreed with Judge Tyler that the Transcript is a bona fide financial publication of general and regular circulation, and hence excluded under the Act, Judge Danaher did not reach any of the constitutional issues because of this conclusion (Appendix A, *infra,* p. 26a). Judge Danaher, however, ruled that the SEC should be given another opportunity to prove that it was entitled to the aid of the Court (Appendix A, *infra,* p. 26a), but to do so the SEC must first prove that the Transcript was *not* the publisher of a bona fide newspaper (Appendix A, *infra,* p. 24a). (Emphasis by Judge Danaher)

The majority sustained the constitutionality of the Act, even though it did not disagree with the District Judge that the Transcript is protected by the First Amendment. The majority reasoned that even though

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[1] See, Recent Developments, 14 Villanova Law Review §17 at p. 520 (1969).

the Transcript or any other member of the press was protected by the First Amendment and even if such members of the press were excluded under the Act, nonetheless the SEC, without semblance of cause, should be permitted to investigate the press to determine these questions initially (Appendix A, *infra,* pp. 11a, 17a-18a). In addition the majority reasoned that the extent to which a publication prints brokers' reports might make a difference (Appendix A, *infra,* p. 11a). That conclusion is in square conflict with every reported case we have found.[2]

In this regard, the majority has misstated petitioner's contentions. Thus, the majority said (Appendix A, *infra,* p. 12a) that "the parties implicitly recognized the importance of discussing the publication's practices in the 'indicia' which they stressed during oral argument . . ." To the contrary, the petitioner contended that both the questions which elicited the indicia and the indicia were constitutionally and legally irrelevant (Appendix C, *infra, pp.* 59a-63a).

In sum, in the words of Judge Danaher the majority has ensconced " 'administrative absolutism' at its unreachable zenith" (Appendix A, *infra,* p. 27a).

Reasons for Granting the Writ

Question No. 1

The majority ruled that, despite its licensing requirement, the Act is constitutional as applied to the press, *if* the press engages in abusive practices. Hence, the ma-

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[2] *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697, 720 (1931); *United States* v. *Arnold,* 380 F. 2d 366 (4 Cir. 1967); *United States* v. *Kelly,* 328 F. 2d 227 (6 Cir. 1965); *United States* v. *Azar,* 243 F. Supp. 345 (E. D. Mich. 1964).

jority ruled that the press may be investigated under this licensing statute, without any semblance of cause, to determine if it is engaged in such practices. Thus the freedom of the press is abridged to determine if such freedom may be abridged.

The Act, as so applied, is unconstitutional since it strips from the press its First Amendment freedoms from licensing and prior restraint on expression and subjects the press to criminal sanctions for use of the mails and interstate facilities unless licensed, merely because of its practices in compiling and printing the content of its publication. To make matters worse the issuance of the license can be deferred virtually indefinitely. Congress has thus unconstitutionally circumscribed the right of the press to publish the news and to enforce policies of its own in regard to what it will publish and how it will edit the news.

The Act is concededly a licensing statute (15 U. S. C. §80b-3). Certain persons and firms may not register with and receive a license from the SEC and the SEC may revoke or suspend such license for violation of any of its rules and regulations or on other grounds (15 U.S. C. §80b-3(d). The issuance of the license may be indefinitely deferred (15 U.S.C. §80b-3(e)). Unless the publisher is licensed he may not use the mails or interstate facilities for any aspect of his business and to do so constitutes a crime (15 U.S.C. §§80b-3(a), 80b-17). Contracts made by an unlicensed publisher are void (15 U.S.C. §80b-15). The SEC is given wide powers of visitation over the publisher and his records (Section 204 of the Act, 15 U.S.C. §80b-4), and it may promulgate rules and regulations which must be obeyed (15 U.S.C. §80b-11). The Courts are authorized to enjoin future publications of the press on an act-wide basis, without bond (15 U.S.C. §80b-9(e), and resumption of publication would thus be a contempt.

Licensing is the essence of censorship and prior restraint on expression.[3] Where as here dissemination of ideas rests on approval of the distributor by the agency there is administrative censorship in an extreme form.[4]

It is immaterial whether the expression relates to social, political, business, financial or economic matters.[5] The Act therefore comes before this Court bearing a heavy presumption against its constitutional validity.[6]

That the Transcript is a member of the press cannot be denied. The District Court found that the Transcript is a newspaper or other entity protected from licensing and prior restraint on expression by the First Amendment (Appendix A, *infra*, pp. 42a-43a). The majority conceded that the Transcript is a member of the press (Appendix A, *infra*, 14a).

Concededly, as Commissioner Wheat made clear, it is a vehicle of information and opinion (91a-92a, 103a). The

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[3] *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931); *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938); *Martin* v. *City of Struthers*, 319 U. S. 141 (1943).

[4] *Largent* v. *Texas*, 318 U. S. 418, 422 (1942).

[5] *United Mine Workers* v. *Illinois State Bar Assn.*, 389 U. S. 217 (1967); *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967); *Griswold* v. *State of Connecticut*, 381 U. S. 479 (1965); *The New York Times Company* v. *Sullivan*, 376 U. S. 254 (1964); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963); *NAACP* v. *Button*, 371 U. S. 415 (1963); *Wood* v. *Georgia*, 370 U. S. 375 (1962); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449 (1958); *Thomas* v. *Collins*, 323 U. S. 516, reh. den. 323 U. S. 819 (1944); *Grosjean* v. *American Press Company*, 297 U. S. 233 (1936).

[6] *Carroll* v. *President and Commissioners of Princess Anne*, 393 U. S. 175 (1968); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963); *Busey* v. *District of Columbia*, 138 F. 2d 592 (D. C. Cir. 1943).

press, in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion irrespective of whether it relates to financial, economic, social or political or other matters.[7]

The information published by the Transcript is the same as that published by daily newspapers throughout the United States and includes reports publicly disseminated by others. As such, the Transcript is entitled as matter of constitutional law to gather and to publish such information without licensing or prior restraint on expression, and undeterred by threatened criminal sanctions or injunctions because it is not licensed.[8]

Moreover, the publications of unlicensed publishers are excluded under the Act from the use of the mails and interstate facilities and the use thereof by unlicensed publishers is a crime. This is per se violative of the First Amendment rights of the press.[9]

Licensing and prior restraint on expression are not remedies which Congress may fashion to correct abuses of the press. Centuries of struggle for press freedom have proved convincingly that the evils of licensing the press far outweigh any possible evils of an unlicensed press that licensing may seek to cure. Not even fraud or

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[7] *United Mine Workers* v. *Illinois State Bar Assn.*, 389 U. S. 217 (1967); *Rosenblatt* v. *Baer*, 383 U. S. 75 (1966); *Lamont* v. *Postmaster General of The United States*, 381 U. S. 301 (1965); *Thomas* v. *Collins*, 323 U. S. 516, reh. den. 323 U. S. 819 (1944); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Lovell* v. *Griffin*, 303 U. S. 444 (1938).

[8] *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931); *Largent* v. *Texas*, 318 U. S. 418 (1942); *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 149 (1967).

[9] *Lamont* v. *Postmaster General of The United States*, 381 U. S. 301 (1965); *Hannegan* v. *Esquire*, 327 U. S. 146 (1946).

the grossest sort of abuses may authorize such flagrant invasion of the rights of the press.[10] The publisher in *Near* was guilty of the most shocking abuses. Public order and the government itself were threatened by his gross misconduct. Nonetheless this Court ruled that the fact that liberty of the press had been seriously abused could not justify any sort of prior restraint on expression.

Other means are adequate to curtail such abuses as fraud, and indeed Section 17(b) of the Securities Act of 1933 (15 U.S.C. §77q (b)) (a non-licensing statute which imposes no prior restraint) makes unlawful such misconduct. Hence, it was constitutionally mandatory for Congress to adopt some means other than licensing to cure the supposed abuses by the press.[11]

No product is here involved. The Transcript concededly has no product to sell. It merely reports the ideas, opinions, speeches and acts of others which are the economic, political and social history of the day. The majority's reference to cases involving the sale of products (Appendix A, *infra*, pp. 14a-15a) is no support for its holding.

The Act's invasion of the First Amendment rights of the press is aggravated by the fact that at the discretion of the SEC licensing can be indefinitely postponed

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[10] *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931); *Talley* v. *California*, 362 U. S. 60 (1960); *St. Amant* v. *Thompson*, 390 U. S. 727 (1968).

[11] *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Griswold* v. *State of Connecticut*, 381 U. S. 617 (1965); *Sherbert* v. *Verner*, 374 U. S. 398 (1963); *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288 (1964); *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964); *Shelton* v. *Tucker*, 364 U. S. 479 (1960); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940).

(15 U.S.C. §80b-3(e)). The public has the right to be informed immediately of any financial, business or economic matters so that it may cope with exigencies.[12] To permit postponement of a license as the Act does is clearly violative of the First Amendment rights of the press and constitutes effective censorship and prior restraint on the press.[13] The good faith or rectitude of the licensor cannot possibly cure such impairment of constitutional rights.[14]

To the contrary, as pointed out *supra*, the majority's holding that Congress may correct abuses of the press by licensing, by prior restraints on expression, by injunction against subsequent publication, by prohibition of the use of the mails by unlicensed publishers, by criminal sanction for failure to be licensed, and that the Act may constitutionally be applied to the press, is in square conflict with the uniform holdings of this Court and of other Courts of Appeal.[15]

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[12] *Thornhill* v. *State of Illinois*, 310 U. S. 88 (1940); *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967); *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 147 (1967).

[13] *Shuttlesworth* v. *City of Birmingham*, 394 U. S. 147 (1969); *Freedman* v. *Maryland*, 380 U. S. 51 (1965); *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478, 518-9 (1962); *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961).

[14] *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964).

[15] *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931); *Grosjean* v. *American Press Company*, 297 U. S. 233 (1936); *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938); *Largent* v. *Texas*, 318 U. S. 418 (1942); *Martin* v. *City of Struthers*, 319 U. S. 141 (1943); *Sherbert* v. *Verner*, 374 U. S. 398 (1963); *Griswold* v. *State of Connecticut*, 381 U. S. 479, 482 (1965); *Lamont* v. *Postmaster General of United States*, 381 U. S. 301 (1965); *Carroll* v. *President and Commissioners of Princess Anne*, 393 U. S. 175 (1968).

Inasmuch as the Act may not constitutionally be applied to any member of the press, including the Transcript, it is palpable that the Transcript and the press may not be investigated under the Act. *There is no conceivable state of facts under which the Act could constitutionally be applied to the Transcript or to the press.* Hence, there can be no possible justification for the investigation. Investigations too are subject to the command that the Congress shall make no law abridging freedom of speech or of the press or assembly.[16] Indeed, the case upon which the majority principally relied,[17] makes it perfectly clear that the agency must show that the investigation is for a lawfully authorized purpose which is within the power of Congress to command.

Where, as here, the Congress has no power to authorize investigations of the Transcript or any segment of the press under this licensing Act, the SEC is without jurisdiction to conduct the investigation and the investigation is per se violative of the First Amendment rights of the Transcript.[18]

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[16] *Watkins* v. *United States*, 354 U. S. 178 (1957); *Sweezy* v. *New Hampshire*, 354 U. S. 234 (1957); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449 (1958); *Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S. 539 (1963); *De Gregory* v. *Attorney General of New Hampshire*, 383 U. S. 825 (1966); *Reed Enterprises* v. *Corcoran*, 354 F. 2d 519 (D. C. Cir. 1965); *Jordan* v. *Hutcheson*, 323 F. 2d 597 (4 Cir. 1963); *Stamler* v. *Willias*, 371 F. 2d 413 (7 Cir. 1966), 415 F. 2d 1365 (7 Cir. 1969); *Liveright* v. *Joint Committee*, 279 F. Supp. 205 (M. D. Tenn. 1968).

[17] *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186 (1945).

[18] *Gojack* v. *United States*, 384 U. S. 702 (1966); *Schneider* v. *Smith*, 380 U. S. 17 (1968); *De Gregory* v. *Attorney General of New Hampshire*, 383 U. S. 825 (1966); *Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S. 539 (1963); *Shelton* v. *Tucker*, 364 U. S. 479 (1960); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449 (1958); *United States* v. *Rumely*, 345 U. S. 1 (1952).

Question No. 2

The majority ruled that it was impossible to determine from reading the Transcript whether it was subject to the Act and licensing thereunder since the publisher's practices must first be explored. By the same token no one could make such determination from reading any newspaper. Thus the majority has subjected every member of the press to open-end investigation under the Act.

The majority below has thus rendered the Act unconstitutional on its face by subjecting every member of the press which publishes financial and business information to the burden of open-end investigation under the Act. To aggravate this unconstitutional burden, the majority has ruled that the investigation may impinge into First Amendment areas on the basis of mere suspicion (Appendix A, *infra,* p. 12a), and in the face of the admission by the SEC that it has no evidence whatsoever that the Transcript engages in any improper activities.

The majority ruled that in order to avoid the licensing and prior restraints imposed by the Act, the press must establish that it is not only protected by the First Amendment but that it is also bona fide as that term is utilized in the Act, and that the term "bona fide newspaper" applied not to the publication but to the practices of the publisher in compiling, editing and reporting the information contained therein (Appendix A, *infra,* p. 15a). In this connection the majority said that the SEC was authorized to conduct investigations under the Act of even bona fide newspapers to determine if they were bona fide (Appendix A, *infra,* p. 17a).

In short, the majority has construed the Act to sweep within its scope of initial investigation The New York Times, Fortune Magazine, The Chicago Tribune, The Miami Herald, The Los Angeles Examiner, The Christian

Science Monitor, The Reader's Digest, and all the newspapers and magazines listed in Appendix D, *infra* (p. 64a, which publish financial data and material about stocks and business. Indeed, the door is opened for licensing and investigation of the press at every level of government, village, city, county and state.

The open-ended investigation authorized by the majority under this Act of any member of the press which publishes financial or business news, with its clear invasion of First Amendment freedoms is unprecedented in law and violative of the basic constitutional freedoms afforded to the press. Where, as here, the exercise of the power of compulsory process impinges upon freedom of the press, the Act which authorizes the investigation and the investigation itself are plainly unconstitutional.[19]

It will not do, as the majority said, to assume that the SEC will be fully aware of the importance of First Amendment considerations when it interprets and applies the Act (Appendix A, *infra,* p. 17a). Proof of an abuse of power has never been a requisite for attack upon the constitutionality of a statute purporting to license the dissemination of information. The rule against licensing is not based upon any assumption that the licensor would act improperly in any respect, but rather the rule derives from an appreciation of the character of the evil inherent in a licensing system. It is not the sporadic abuse of power by the licensor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of the press.[20]

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[19] *De Gregory* v. *Attorney General of New Hampshire,* 383 U. S. 825 (1966); *Gibson* v. *Florida Legislative Investigation Committee,* 372 U. S. 539 (1963); *United States* v. *Rumely,* 345 U. S. 41 (1952); *Stamler* v. *Willis,* 371 F. 2d 413 (7 Cir. 1966), 415 F. 2d 1365 (7 Cir. 1969); *Continental Oil Co.* v. *United States,* 330 F. 2d 347 (9 Cir. 1964); *Jordan* v. *Hutcheson,* 323 F. 2d 597 (4 Cir. 1963); *In re Subpoena Duces Tecum,* 81 F. Supp. 418 (N. D. Cal. 1948).

[20] *Thornhill* v. *Alabama,* 310 U. S. 88 (1940).

As Mr. Justice Douglas pointed out:[21]

> "A publisher compelled to register with the federal Government, would be subjected to vexatious inquiries. A requirement that a publisher disclose the identity of those who buy his books, pamphlets or papers, is indeed the beginning of surveillance of the press. . . . The finger of government levelled against the press is ominous. . . . Through the harassment of hearings, investigations, reports and subpoenas, government will hold a club over speech and over the press."

No publisher could possibly have comprehended that the Act authorized investigations of his business practices to determine if he should be licensed, and that if the SEC found his practices were improper he would be subject to licensing. Thus the Act, as construed by the majority to sweep within its scope any member of the press which publishes financial and business news, is unconstitutionally vague and indefinite and also unconstitutional by reason of overbreadth and the holding of the majority below is in square conflict with the decisions of this Court.[22]

In addition, the majority said that mere suspicion without any evidence of wrongdoing was sufficient to subject the press to open-end investigation under this licensing Act, notwithstanding that the very nature of the investigation impinges upon First Amendment freedoms. As

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[21] *United States* v. *Rumely*, 345 U. S. 41, 57-8 (1952—concurring opinion).

[22] *Interstate Circuit Inc.* v. *City of Dallas*, 390 U. S. 676 (1968); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Cramp* v. *Board of Public Instruction of Orange County, Florida*, 368 U. S. 278 (1961).

matter of constitutional law, the Act as so construed is unconstitutional.[23]

Question No. 3

The majority erred in two respects in its construction of the Act. First, it erred in its construction of the definition of investment adviser; and second in its construction of the exclusions from the Act.

The majority construed the statutory definition of investment adviser—one who promulgates reports concerning securities for compensation (15 U.S.C. §80b-2(a)(11)—to encompass any member of the press which

i) as part of its publication reports publicly disseminated broker's reports concerning securities (albeit these reports also cover major economic, political and social problems); and

ii) fully discloses the identity of the author of the broker's report; and

iii) does not adopt the broker's report as its own; and

iv) disclaims any advocacy of the broker's report and of everything stated therein; and

v) is compensated for its newspaper at its regular subscription or newstand price.

The majority further construed the statutory exclusion of "bona fide newspapers" to apply only to those members of the press whose practices are not improper. Thus the majority ruled that the term "bona fide newspaper" was not as broad as the term "press" in the First Amendment.

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[23] *Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S. 539, 557 (1963); *Sweezy* v. *New Hampshire*, 354 U. S. 234, 245 (1957); *Jordan* v. *Hutcheson*, 323 F. 2d 597 (4 Cir. 1963); *Pollard* v. *Roberts*, 283 F. Supp. 248 (E. D. Ark. 1968).

The District Court disagreed with the majority on both points. It held that one who merely reprints reports of brokers, gives full attribution to the writer thereof, and does not adopt the report as its own, is not an investment adviser as that term is defined in the Act. Moreover, the District Court ruled that the term "bona fide newspaper" was as broad as the term "press" in the First Amendment. Accordingly, the Transcript was not an investment adviser under the Act and was also excluded from the Act and the investigatory powers of the SEC as a bona fide newspaper.

The majority's ruling is clearly erroneous on both points. The majority failed to comprehend the principle of law that where First Amendment rights are concerned the Courts will narrowly construe the statute and the investigatory powers of the agency in order to avoid any confrontation with First Amendment freedoms.[24]

1) The Act *defines* an investment adviser (Section 202 of the Act, 15 U.S.C. Sec. 80b-2(a)(11)) as one who advises others as to the value of securities or as to the advisability of investing in or purchasing or selling securities or issues or promulgates analyses or reports concerning securities for compensation. The Transcript does none of these things for compensation or otherwise.

This definition of investment adviser is vague and indefinite to put it mildly. Does The New York Times or petitioner promulgate reports "concerning securities" for compensation merely because they print information about securities and are paid the subscription or newsstand price for the paper? Does a publisher of a newspaper receive

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[24] *Schneider* v. *Smith*, 390 U.S. 17 (1968); *United States* v. *Rumely*, 345 U.S. 41 (1952); *United States* v. *Harriss*, 347 U.S. 612 (1954).

compensation for publishing reports "concerning securities "when he reprints a broker's report in its entirety giving full credit to the broker who wrote the report, and receives only the subscription or newsstand price for his paper?

Does The New York Times or The Christian Science Monitor or any other newspaper bear a fiduciary relationship[25] to every subscriber merely because it publishes reports "concerning securities" and also publishes analyses "concerning securities" prepared by others?

If the term "investment adviser" sweeps within its scope any newspaper, book or magazine, which does the foregoing, and if such publications are not excluded from the Act, then clearly the Act raises grave constitutional questions. Yet, that is precisely the construction placed upon the Act by the majority. We submit that not only is such construction unconstitutional but that it flies in the face of the Act and the intention of Congress.

The Transcript does not advise others as to the value of securities or as to the advisability of investing in or purchasing or selling securities; that provision of the Act requires advocacy at a minimum and it requires direct advocacy to individual members of the public as a matter of constitutional law.[26]

The Transcript expressly disclaims any notion of advocacy or advice with respect to any aspect of securities or of the reports it publishes (86a-87a; Appendix A, *infra*, p. 3a). The Transcript does not issue or promul-

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[25] *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U. S. 180 (1963).

[26] *United States* v. *Harriss*, 347 U. S. 612, 620 (1954); 1960 U. S. Code, Cong. & Admin. News 3503; see also, *SEC* v. *Capital Gains Research Bureau*, 375 U. S. 180, 191-2 (1963).

gate analyses or reports concerning securities; it only reports what others publicly disseminate and gives full attribution to the writer thereof (85a-87a; Appendix A, *infra*, pp. 39a-40a). To say that one issues or promulgates reports when all that one does is publish that which is within the public domain (85a-87a) is to fly in the face of reality. Whatever the Transcript publishes is also published in a myriad of other newspapers, dailies, and publications (87a, 113a, 115a, 116a-133a). Palpably, none of these dailies nor the Transcript is or can constitutionally be an investment adviser.[27]

2) Moreover, the Transcript is expressly excluded from the Act and the jurisdiction of the SEC. The erroneous ruling of the majority below that the Transcript does not necessarily fall within the exclusion for bona fide newspapers or business or financial publications is predicated on the argument that much of its published material consists of reprinted reports concerning securities and that each issue contains a cumulative index of the contents which lists various companies by name (Appendix A, *infra*, p. 12a).

Of course how a newspaper indexes its contents and publishes the news is certainly within the discretion of the newspaper and could not possibly convert it into something other than what it is. It is a constitutional right of a newspaper to index its contents as it desires and its

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[27] *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945); *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1935); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1930); *United States* v. *Arnold*, 380 F. 2d 366 (4 Cir. 1967); *United States* v. *Kelly*, 328 F. 2d 227 (6 Cir. 1964); *United States* v. *Azar*, 243 F. Supp. 345 (E. D. Mich. 1964); II Loss, Securities Regulation, p. 1400 (1960).

policies in publishing the news may not be circumscribed by Congress.[28]

Section 202(a)(11) of the Act, 15 U.S.C. Sec. 80b-2(a)-(11) expressly excludes the publisher of any bona fide newspaper, news magazine or business or financial publication of general or regular circulation. Certainly, Congress must have understood that the First Amendment barred any licensing or prior restraints on these publications. Congress has shown an abundance of caution and sensitivity in legislating in areas affecting the press. Congress could certainly have had no intent to leave any doubt as to the status of The New York Times or of The Readers Digest (Also see, Appendix D, *infra*, p. 64a). Congress could never have conceived of granting authority to any agency to roam at will through the practices of the New York Times or any other newspaper. Accordingly, the exclusion must be read to be as broad as the term "press" in the First Amendment. The ruling of the majority below to the contrary is plainly erroneous.[29]

The Act, by its very terms, and in the light of the teaching of the First Amendment, must be confined to those persons who treat with their clientele on a person-to-person basis for compensation related to the specific subject matter of the advice supplied.[30]

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[28] *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1930); *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1935); *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 132-3 (1937); *Wood* v. *Georgia*, 370 U. S. 375 (1962).

[29] *United States* v. *Harriss*, 347 U. S. 612 (1954); *United States* v. *Rumely*, 345 U. S. 41 (1952).

[30] *United States* v. *Harriss*, 347 U. S. 612 (1954); *United States* v. *Rumely*, 345 U. S. 41 (1952); *Matter of New York County Lawyers Association* v. *Dacey*, 21 N. Y. 2d 694 (1967), reversing on the dissenting opinion below, 28 App. Div. 2d 161 (1st Dept. 1967).

It is perfectly obvious that Congress could not have contemplated that any member of the press would have been required to maintain and submit to the SEC the type of records set forth in Section 204 of the Act (15 U.S.C. §80b-4) and that Section 205 of the Act (15 U.S.C. §80b-5) could not possibly apply to a member of the press. Certainly, Congress could not have intended to strike down every contract made by an unlicensed newspaper although that is the effect of Section 215 of the Act (15 U.S.C. Sec. 80b-15) if the Act applies to newspapers whose practices are improper.

In sum, the construction of the Act by the majority is clearly wrong both on the basis of the language and intent of the Act and the constitutional prohibitions against licensing and imposing prior restraints on the press.

Question No. 4

The priority afforded to First Amendment rights mandates that the Courts initially determine the jurisdiction of the SEC to conduct the investigation. It is the Courts, not the SEC, which are the experts in such constitutional areas.

The Courts may not leave it to the SEC to determine the constitutional and legal issues which underlie the jurisdictional question, even if to do so the Courts must preliminarily decide coverage of the Act. Persons threatened by investigatory proceedings may not be forced to submit to them before securing Court adjudication of their First Amendment rights. Otherwise constitutional rights are abridged in order to determine if they may be abridged.

The District Court ruled that where First Amendment rights are involved the Courts, and not the SEC, must decide the jurisdiction of the SEC to investigate the Transcript (Appendix A, *infra*, p. 45a). Judge Danaher pointed out that for the Courts to abjure that duty was to "en-

sconce 'administrative absolutism' at its unreachable zenith" (Appendix A, *infra*, p. 27a).

The majority, relying on *Oklahoma Press Pub. Co.* v. *Walling*[31] ruled that the SEC should initially determine its jurisdiction because the SEC is best suited to make the determination of 'bona fide' newspaper status in the first instance (Appendix A, *infra*, pp. 16a-17a). The majority's reliance on *Oklahoma* was entirely misplaced and its view as to the SEC's expertise is at odds with the SEC's admission that it could not specify the factors upon which its judgment might be exercised (Appendix A, *infra*, p. 24a).

Oklahoma makes it perfectly clear that the Courts must determine whether the investigation is for a lawfully authorized purpose within the power of Congress to command. Moreover, *Oklahoma* did not involve a licensing statute, did not involve exclusion from commerce of the newspaper of a non-conforming publisher, and as this Court noted the statute there involved could not end in any restraint upon expression or any other evil outlawed by the First Amendment.

Where, as here, First Amendment rights are admittedly involved, those rights must prevail over any policy of judicial non-interference with administrative functions. The Constitution is not to be relegated for application to administrative agencies. The Constitution commands that the Courts, not the legislature or the executive, or any agency of either or both, determine and apply constitutional rights.[32]

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[31] 327 U. S. 186 (1946).

[32] *Gibson* v. *Florida Legislative Investigation Com.*, 372 U. S. 539 (1963); *Gojack* v. *United States*, 384 U. S. 702, ftn. 6 of p. 707 (1966); *Greene* v. *McElroy*, 360 U. S. 474, 507 (1959); *United States* v. *Brown*, 381 U. S. 437 (1965); *Manual Enterprises* v. *Day*, 370 U. S. 479 (1962).

The SEC is here affirmatively seeking the aid of the Courts. Before the Courts can tender any aid to the SEC, the Courts must initially determine whether or not the Act is constitutional both on its face and as the SEC seeks to apply it under its investigation—i.e. as an Act to license the press. If the Act is unconstitutional then it is void and it cannot vest jurisdiction in the SEC to issue the subpoena or in the Courts to enforce it.[33]

The Constitutional immunity claimed by the Transcript under the First Amendment poses a threshhold question which must be determined before the investigation may proceed, since the investigation itself is an evil which the First Amendment was designed to prevent.[34]

Nothing will chill a free press faster or more thoroughly than broad fishing expeditions such as are involved here. This is a modern day version of the writs of assistance used to crush the press and which were outlawed in England as violative of the common law.[35]

As the District Court found, the investigation will necessarily chill the Transcript's First Amendment rights (Appendix A, *infra*, pp. 38a-39a). Commissioner Nicholas Johnson of the FCC pointed out (New York Times p. 18, January 13, 1970), that the wave of government subpoenas

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[33] *Marbury* v. *Madison*, 1Cranch 137 (1803); *Norton* v. *Shelby County*, 118 U. S. 425 (1886).

[34] *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *Zwickler* v. *Koota*, 389 U. S. 241 (1967); *Sheridan* v. *Garrison*, 415 F. 2d 699 (5 Cir. 1969); *United States* v. *Judson*, 322 F. 2d 460 (9 Cir. 1963); *Stamler* v. *Willis*, 371 F. 2d 413 (7 Cir. 1966), 415 F. 2d 1365 (7 Cir. 1969); *Liveright* v. *Joint Committee*, 279 F. Supp. 205 (M. D. Tenn. 1968).

[35] *Stamford* v. *State of Texas*, 379 U. S. 476 (1965), reh. den. 380 U. S. 926 (1965); *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961).

has placed the freedom and integrity of the country's news media in serious jeopardy. Sources of news and information will dry up, he added, under the pressure of the subpoenas.

At bar, the situation is far more serious. The subpoenas issued to the media are not issued pursuant to any licensing statute and they are not directed to the party under investigation. To the contrary the subpoena here is issued under a licensing statute and is directed to the party under investigation. The Transcript's right to receive information and to publish it are both under attack. Its stock-in-trade (its news sources) are placed in jeopardy (75a-76a), and there is a clear and present danger of loss of its subscribers and advertisers (75a). These reasons mandate that the Courts, not the SEC, initially determine the issue of jurisdiction.[36]

In addition, the Act provides criminal sanctions for use of the mails or interstate facilities by unlicensed publishers. The Transcript may not be exposed to such criminal sanctions while it awaits the SEC's decision.[37]

The majority have permitted the investigation to proceed on the basis of pure "suspicion" (Appendix A, *infra*, p. 12a), in the face of the SEC's admission that it has no evidence to subject the Transcript to the Act (Appendix A, *infra*, p. 16a), and that it cannot state the factors upon which it will predicate its judgment (Appendix A, *infra*, p. 24a). There is thus here lacking, any solid basis for any belief that the investigation will be productive. Ac-

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[36] *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965).

[37] *Zwickler* v. *Koota*, 389 U. S. 241 (1967); *United States* v. *Brown*, 381 U. S. 437 (1965); *Ex parte Young*, 209 U. S. 123 (1908); *United Steelworkers of America* v. *Bagwell*, 383 F. 2d 492 (4 Cir. 1967); *Baines* v. *City of Danville*, 337 F. 2d 579 (4 Cir. 1964), cert. den. 381 U. S. 939 (1965); *Stapleton* v. *Mitchell*, 60 F. Supp. 51 (D. Kan. 1945), dism. 326 U. S. 690 (1945).

cordingly, the majority has failed to enforce the Transcript's constitutional rights and its holding that the SEC may determine its own jurisdiction is in conflict with the decisions of this Court and of other Courts of Appeal.[38]

Moreover, the SEC is neither qualified nor endowed with authority to determine the constitutional issues which underlie its jurisdiction; such decisions are relegated solely to the courts.[39]

The District Court's decision is thus clearly correct; for as *Gibson* makes plain where governmental inquiries are claimed to infringe First Amendment freedoms it is the Courts which must determine the permissibility of the challenged action.

Question No. 5

The Fourth Amendment mandates that the production demanded be limited in scope, relevant in purpose, and specific in directive. Writs of assistance, no matter how disguised, are alien to the Constitution and destructive of freedom of press.

Neither Judge Danaher nor the District Judge reached the issues raised under the Fourth Amendment, although both recognized the "all-encompassing nature of the subpoena sought" (Appendix A, *infra*, pp. 23a-24a). The majority merely pointed out that the subpoena sought "certain correspondence and advertising materials which appear to be directly related to an investigation of the type of practices which might cause a newspaper to fall outside the Act's exclusion" (Appendix A, *infra*, p. 18a).

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[38] *Gibson* v. *Florida Legislative Investigative Committee*, 372 U. S. 539 (1963); *Jordan* v. *Hutcheson*, 323 F. 2d 597 (4 Cir. 1963).

[39] *Greene* v. *McElroy*, 360 U. S. 474, 507 (1959); *United States* v. *Robel*, 389 U. S. 258, 276 (1967—concurring opinion); *United States* v. *Brown*, 381 U. S. 437 (1965).

Judge Danaher disagreed. He pointed out that the "subpoena sought not merely 'certain correspondence and advertising material,'" but *"All of the following . . . :* "Copies of *all advertisements . . . . All correspondence* with subscribers . . . . *All* documents . . . and any other writings . . . ." (Emphasis, the Courts). (Appendix A, *infra*, p. 23a).

If the practices to be investigated are, as the majority suggests, whether or not the Transcript is paid for printing or positioning certain broker's reports (which are publicly disseminated by the brokers (85a)), or whether or not the Transcript serves some outside financial interest, then it is perfectly clear that items 1 and 2 of the subpoena have no relation to such business practices. Items 1 and 2 seek materials relating to the sale of the Transcript, including all correspondence with subscribers, from which, of course, lists of subscribers can be developed (18a). Moreover, item 3 relates not only to broker's reports but to "management speeches and all other written materials for publication in the Wall Street Transcript" (18a). Again, matter having no conceivable reference to the business practices to which the majority alluded.

The subpoena demands the production of virtually unlimited pieces of correspondence of the Transcript, which is neither specific in directive nor relevant in purpose, except to expose the Transcript's sources of information and list of subscribers and thereby injure and destroy the Transcript (75a-76a).

The result can only be to injure and destroy the Transcript through the use of unbridled search and seizure, since the SEC even as late as the oral argument in the Court below, was unable to state the factors on which it had or would predicate its judgment. If the Transcript can be subjected to these modern day writs of assistance

then so can every other newspaper or publication in the nation.

The SEC told the Court below (SEC br. pp. 23, 10, 12, 13) that the purpose of its investigation is to determine whether the Transcript should be licensed as an investment adviser.

Not a word is offered by the SEC as to why the documents subpoenaed, involving, as they do, modes of sale of, obtaining of information by, and correspondence with subscribers to, the Transcript, are relevant to the determination of whether or not the Transcript is an investment adviser. Neither the majority below nor the SEC has been able to suggest any valid reason as to why the newspaper itself is not the prime, if not sole, basis for decision here, or why any investigation at all is necessary. The obvious inference to be drawn is that there is no justification for this oppressively irrelevant and unreasonable subpoena, much less for any investigation of the Transcript (94a-96a).

This investigation was not commenced because of any complaint against the Transcript but because of a staff report (Appendix A, *infra*, pp. 2a-3a) which was never produced. The Transcript charged in its answering affidavit that the investigation was motivated by personal animosity of the SEC and its staff against the president of the petitioner (97a). The answering affidavit stated that the petitioner's president was anathema to the SEC and that the Transcript's editorials had attacked the SEC for its abuses and violations of the very statutes it is sworn to uphold (97a). The affidavit further asserted that compliance with the subpoena would require the trucking of an unconscionable load of material to the place of hearing and would disorganize and disrupt petitioner's files and records (95a).

None of these statements was denied by the SEC although it filed affidavits purporting to answer petitioner's papers (136a-139a, 228a-232a).

As Judge Danaher noted the SEC's order predicated the investigation on the claim that the Transcript is an investment advisory publication and that petitioner is an investment adviser within the meaning of the Act (Appendix A, *infra*, p. 27a). Under such circumstances the least that the SEC should have done here was to demonstrate that the subpoenaed documents are relevant and pertinent to support the claim that the Transcript is an investment advisory publication and that the petitioner is an investment adviser.

The decision of the Court below sustaining the subpoena duces tecum as in conformity with the law and the Fourth Amendment is squarely in conflict with the decisions of this Court and of other Courts of Appeal.[40]

Indeed, the subpoena seeks an unlimited investigation (18a). If Congress intended to authorize such broad scale, indefinite investigation the investigatory provision of the Act is clearly violative of the First Amendment.[41]

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[40] *Hale* v. *Henkel*, 201 U. S. 43 (1905); *Stamford* v. *State of Texas*, 379 U. S. 476 (1965), reh. den. 380 U. S. 926 (1965); *See* v. *City of Seattle*, 387 U. S. 541 (1967); *Shasta Minerals & Chem. Co.* v. *SEC*, 328 F. 2d 285 (10 Cir. 1964); *Bank of America Nat. Trust & Sav. Assn.* v. *Douglas*, 105 F. 2d 100 (D. C. Cir. 1939).

[41] *Watkins* v. *United States*, 354 U. S. 178 (1957); *Sweezy* v. *New Hampshire*, 354 U. S. 254 (1957); *Scull* v. *Virginia ex rel. Committee on Law Reform and Racial Activities*, 359 U. S. 44 (1959).

CONCLUSION

In sum, we here have a case failing to vindicate constitutional promises and introducing far-reaching innovations in the law of administrative investigations. The decision of the majority below is in conflict with decisions of this Court and of other Courts of Appeal on the same matters. The Court below has decided important constitutional questions and questions of federal law in such a way as to unsettle and inject uncertainty into the constitutional rights of the press. Licensing and prior restraints on expression which have long since been thought to be barred by the First Amendment have now been sanctioned.

The sweep of the decision cuts across every conceivable aspect of the press. No member of the press may, with safety, comment on financial affairs or securities. The threat of the licensor and the censor hangs heavy over the press. In short, the majority of the Court below has sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Date: New York, N. Y.
April 20, 1970

Respectfully submitted,

SAMUEL N. GREENSPOON
Counsel for Petitioner
201 East 42nd Street
New York, New York 10017
212-867-0606

Of Counsel

SAMUEL N. GREENSPOON, ESQ.
HARRY KALVEN JR., ESQ.

APPENDIX A

Opinions of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 296—September Term, 1969.

(Argued November 17, 1969 Decided February 2, 1970.)

Docket No. 33350

In the Matter of an Application to Enforce Administrative Subpoena *Duces Tecum* of the SECURITIES AND EXCHANGE COMMISSION,

Applicant-Appellant,

—v.—

WALL STREET TRANSCRIPT CORPORATION, by RICHARD A. HOLMAN,

Respondent-Appellee.

Before:

LUMBARD, *Chief Judge,*
DANAHER* and ANDERSON, *Circuit Judges.*

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*John A. Danaher, Senior Circuit Judge of the District of Columbia Circuit, sitting by designation.

Appendix A

Appeal from order of the United States District Court for the Southern District of New York, Harold R. Tyler, Jr., *Judge*, denying a petition for enforcement by the Securities and Exchange Commission of an investigative subpoena, issued pursuant to the Investment Advisers Act of 1940, 15 U.S.C. §80b-9. Reversed.

DAVID FERBER, Esquire, Securities and Exchange Commission, Washington, D. C. (Philip A. Loomis, Jr., General Counsel, Theodore Sonde, Special Counsel, and Harvey L. Pitt, Esq., Securities and Exchange Commission, Washington, D. C.; Richard V. Bandler, Associate Regional Administrator, Edwin H. Nordlinger, Special Counsel, and Michael S. Leo, Esq., New York Regional Office, Securities and Exchange Commission, New York, N. Y., on the brief), *for Appellant.*

SAMUEL N. GREENSPOON, Esq., New York, N. Y. Martin I. Kaminsky, Esq., Jonathan S. Gaynin, Esq., and Pollack, Greenspoon & Singer, New York, N. Y., on the brief), *for Appellee.*

ANDERSON, *Circuit Judge*:

On July 27, 1967, the Securities and Exchange Commission ordered an investigation of the Wall Street Transcript Corp., pursuant to §209(a) of the Investment Advisers Act of 1940, 15 U.S.C. §80b-9(a), to determine whether it was acting an an investment adviser in violation of §203 of that Act, 15 U.S.C. §80b-3, the registration provision. This action resulted, not from any specific com-

plaint received,[1] but from a staff report concerning the nature of the appellee's publication, *The Wall Street Transcript,* issued weekly in a newspaper format,[2] and the ad-

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[1] The appellee suggests in a footnote to its brief that the investigation was part of a "staff vendetta" against the *Transcript's* owner whose broker-dealer registration was revoked and who was expelled from membership in The National Association of Securities Dealers and enjoined for securities laws violations. See *R. A. Holman & Co.* v. *SEC,* 366 F.2d 446 (2 Cir. 1966), amended *per curiam,* 377 F.2d 665, cert. denied, 389 U.S. 991 (1967); *SEC* v. *R. A. Holman & Co.,* 366 F.2d 456 (2 Cir. 1966), cert. denied, 389 U.S. 991 (1967). No basis is suggested for this charge, which does not appear to have been mentioned in the court below. Contrast *Shasta Minerals & Chemical Co.* v. *SEC,* 328 F.2d 285 (10 Cir. 1964).

[2] The *Transcript* is printed on newsprint, in the form of a tabloid newspaper. It appears weekly and is sold by subscription for $180 per year or by the single copy of $5 per issue. An inspection reveals its primary content to be reports upon specific securities, each of which is identified with the name and address of a broker-dealer firm; and the masthead states, in part:

> "The Wall Street Transcript publishes security reports and comments of others in the entirety as a service to subscribers. The Wall Street Transcript does not in any way endorse or guarantee the accuracy or reliability of any of the information, statements, or opinions expressed in the reports by the firms which have written them. We take due care to transcribe accurately what has been written by others but because of the possibility of human and mechanical error, we cannot assume any liability for the correctness of the transcription."

The *Transcript* also prints some management speeches, miscellaneous personnel announcements, and editorials. Its masthead lists only the names of Richard A. Holman, publisher and editor, and Mrs. L. J. Newman, managing editor. It also discloses that the publication has a second-class postage permit.

vertising used in its sale to the public.[3]

The *Transcript's* principal operating officer, Richard A. Holman, appeared at a hearing July 29, 1968, in response to the Commission's subpoena *duces tecum*. On the advice of counsel, Holman refused to produce any documents or answer any questions whatsoever other than to state his name, addresses, and telephone numbers. The Commission then applied to the district court pursuant to §209(c) of the Act for enforcement of its subpoena, which called for the production of certain advertising material and correspondence with subscribers, prospective subscribers, and suppliers of securities reports published in the *Transcript*.[4]

The court below refused enforcement, *SEC* v. *Wall Street Transcript Corp.*, 294 F. Supp. 298 (S.D.N.Y. 1968). It concluded that the *Transcript* is a "bona fide news-

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[3] Advertisements to sell the *Transcript* have appeared in such publications as the *Wall Street Journal*, *New York Times*, and *Barron's*. The text typically offers such statements as "buy-sell-hold-switch recommendations," followed by an index of the companies whose securities have been discussed in the *Transcript*.

[4] Books, papers and documents subpoenaed were:

> "All of the following relating to the business of Wall Street Transcript Corporation during the period from January 1, 1967, until the present: (1) Copies of all advertisements, notices, circulars, newspaper articles and any other writings used in connection with the sale of the Wall Street Transcript. (2) All correspondence with subscribers and prospective subscribers of the Wall Street Transcript. (3) All documents, agreements, memoranda, correspondence and any other writings relating or containing reference to the obtaining of reports, comments, management speeches and any other written materials for publication in the Wall Street Transcript."

paper" or "financial publication of general and regular circulation" which is expressly excluded from the definition of "investment adviser" by §202(a)(11)(D) of the Act itself, 15 U.S.C. §80b-2(a)(11)(D),[5] and therefore need not register. It held that under the circumstances of this case the court, rather than the administrative agency, was the proper body to make the initial determination concerning the question of exclusion from coverage by the Act:

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[5] §202(a)(11), 15 U.S.C. §80b-2(a)(11), provides:

"'Investment adviser' means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include (A) a bank, or any holding company affiliate, as defined in section 221(a)(c) of Title 12, which is not an investment company; (B) any lawyer, accountant, engineer, or teacher whose performance of such services is solely incidental to the practice of his profession; (C) any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor; (D) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation; (E) any person whose advice, analyses, or reports relate to no securities other than securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States, or securities issued or guaranteed by corporations in which the United States has a direct or indirect interest which shall have been designated by the Secretary of the Treasury, pursuant to section 78c(a)(12) of this title, as exempted securities for the purposes of the Securities Exchange Act of 1934; or (F) such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulations or order."

> "Where, as here, a publisher which presumptively is entitled to the protection of the First Amendment can make virtually an unrebutted showing that it is a bona fide newspaper and financial publication, a federal court should stay the hand of the investigating agency. An entirely different question would be presented if the SEC had complaints or other evidence of conduct by the publisher outside the normal functions of compiling and distributing an excluded publication." 294 F. Supp. at 307.

Since the district court's opinion also contained a reference to the "all-encompassing nature of the subpoena sought," the SEC asked for a "reargument or clarification" to determine whether a more limited subpoena or one with protective provisions might be enforced. The court concluded that these arguments were "clearly answered" by its original opinion, which had interpreted the Act to mandate exclusion of the *Transcript* from coverage or even investigation in the absence of some evidence of non-newspaper-like conduct.

As the court below recognized, it has long been established that the question of the inclusion of a particular person or entity within the coverage of a regulatory statute is generally for initial determination by an agency, subject to review on direct appeal, rather than for a district court whose jurisdiction is invoked to enforce an administrative subpoena. So long as an agency establishes that an investigation "will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within [its] possession, and that the administrative steps required . . . have been followed," no showing of probable cause need be made to the district court unless a statute indicates other-

wise. *United States* v. *Powell,* 379 U.S. 48, 57-58 (1964); *FTC* v. *Crafts,* 355 U.S. 9 (1957); *Oklahoma Press Pub. Co.* v. *Walling,* 327 U.S. 186 (1946); *Endicott Johnson Corp.* v. *Perkins,* 317 U.S. 501 (1943); 1 Davis, *Administrative Law,* §3.12 (1958). If these criteria are satisfied, the court will order enforcement unless there is danger that its process may be abused. *United States* v. *Powell* 379 U.S. at 58.

Despite the absence of a finding that the subpoena was deficient in any of these respects, the district court felt that unique facts distinguish the instant case from this "substantial" line of precedents concerning initial determination of coverage by an agency. These circumstances were held to include not only the "virtually unrebutted showing" that the appellee qualified for a statutory exclusion, but also the fact that First Amendment consideration required a prompt court ruling upon coverage:

> "In the case at bar, I reason that the Commission's broad inquiry under the Act can end only in restraint of expression by the Wall Street Transcript. If a newspaper operates under the threat of disclosure to a government agency of its news sources and subscribers' identities, for example, it will be cautious, to say the least, about what it prints. Its 'caution' will only increase when its advertisers become apprehensive and its subscribers become intimidated by government scrutiny. This is classic restraint of expression which needs no further elaboration here. Plainly, neither the First Amendment nor the powers conferred by Congress in the Act upon the SEC permit an inquiry which can only lead to such a restraint by a newspaper." 294 F. Supp. at 304.

Appendix A

Detecting "the seeds of a constitutional controversy" in "the Commission's possible intention to apply the Act to what appears to be a bona fide newspaper," the court interpreted the statute to permit it to bar an investigation which it felt "goes to the jugular of the Transcript as a publishing firm." The Commission disputes this admittedly unprecedented interpretation and argues that the determination of "bona fide newspaper" status by the court was both premature and incorrect. The appellee argues, on the other hand, that not only the statute but the First Amendment as well bars enforcement of the subpoena.

As the Supreme Court has stated, "The Investment Advisers Act of 1940 was the last in a series of Acts designed to eliminate certain abuses in the securities industry, abuses which were found to have contributed to the stock market crash of 1929 and the depression of the 1930's" *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963). The Act's general objective, as summarized by the Senate Report upon the bill amending it in 1960, is "to protect the public and investors against malpractices by persons paid for advising others about securities." 1960 U. S. Code, Cong. & Admin. News 3503. It "reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship,' as well as a congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested." *SEC* v. *Capital Gains Research Bureau, supra*, at 191-192. (Footnote omitted.)

The core of the Act is its registration provision, §203, which renders it unlawful for a non-registered investment adviser to make use of the mails or any instrumentality of interstate commerce in connection with his business. In

addition, substantive provisions contained in §§205, 206 and 207 of the Act are designed to eliminate several specific practices labelled as abuses found to have existed at the time of the law's enactment. See., e.g., *SEC* v. *Capital Gains Research Bureau, Inc., supra; Marketlines, Inc.* v. *SEC*, 384 F.2d 264 (2 Cir. 1967); see also Loomis, *The Securities Exchange Act of 1934 and the Investment Advisers Act of 1940*, 28 Geo Wash. L. Rev. 214, 244-245 (1959); 1960 U.S. Code. Cong. & Admin. News 3503.

The definition of "investment adviser" given in the Act, §202(a)(11), 15 U.S.C. §80b-2(a)(11), is broad and comprehensive but is followed by a series of exclusions, (A) through (F), of which (D) is "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation."[6] In the absence of any legislative history which would shed light upon congressional intent in adding this newspaper exclusion or which might affect the scope of the definition, itself,[7] the court below concluded that this exclusionary clause was simply a recognition "that Congress was aware that it could not lawfully command or authorize regulation and licensing by the SEC of bona fide newspapers in the light of the teaching of the Frst Amendment." 294 F. Supp. at 307. Thus the district court and the parties before us have interpreted the adjective "bona fide" to mean that the SEC may investigate only such newspapers as are

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[6] See note 5, *supra*. In addition to the definitional exclusions contained in §202(a)(11), 15 U.S.C. §80b-2(a), §203(b), 15 U.S.C. §80b(3)(b), of the Act exempts certain investment advisers from registration but these do not relate to the present case.

[7] See 86 Cong. Rec. 9807-9817, 10077 (1940).

engaged in the activities of an investment adviser and which do not have "all the usual indicia of a newspaper as that term is generally understood by the public and is normally used to indicate an entity protected by the free press clause of the First Amendment." 294 F. Supp. at 306. The case has been presented as if the sole determinative issue were the number of "the usual indicia of a newspaper" the *Transcript* possesses, and the district court based its holding largely upon the size of the bundle of such characteristics.[8]

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[8] In addition to the information appearing from an examination of a copy of its publication, see note 2, *supra*, the appellee disclosed in affidavits to the district court that the *Transcript* began publication in June, 1963, and now has some 8,000 subscribers. The district court, which decided the case on the basis of affidavits only, found these subscribers to include "universities, libraries, corporations, individuals, trust companies, accounting firms, mutual funds, brokers, insurance companies and government agencies." 294 F. Supp. at 305.

While at one point in its opinion the trial court denominates the *Wall Street Transcript* a "bona fide financial publication of general and regular circulation" (294 F. Supp. at 306), this is in the context of a discussion in which the court refers to the *Transcript* as a "bona fide newspaper or financial publication of general and regular circulation"—treating the publication as if it could be properly described as either or both of those two exclusions under the statute. The bulk of what the trial court had to say concerned its finding that the *Transcript* had nearly all the characteristics of a newspaper. In its recapitulation (p. 307) it concluded that the publisher could make "virtually an unrebutted showing that it is a bona fide newspaper and financial publication . . ." In view of the emphasis placed upon the trial court's inclusion in its finding of "a bona fide financial publication of general and regular circulation" by our learned brother in his concurring opinion, it should be borne in mind that the discussion and holding by the majority is intended to apply to the statutory exclusion of a financial publication as well as to the newspaper exclusion.

We do not think, however, that this is what Congress had in mind when it placed "bona fide" newspapers among the exclusions from the statute's coverage. Section 202(a)(11) of the Act lists a number of examples of persons or entities whose activities might fall within the broad definition of "investment adviser" but whose customary practices would not place them in the special, otherwise unregulated, fiduciary role for which the law established standards. Cf. *SEC* v. *Capital Gains Research Bureau, Inc.*, *supra*. The phrase "bona fide" newspapers, in the context of this list, means those publications which do not deviate from customary newspaper activities to such an extent that there is a likelihood that the wrongdoing which the Act was designed to prevent has occurred.[9] The determination of whether or not a given publication fits within this exclusion must depend upon the nature of its practices rather than upon the purely formal "indicia of a newspaper" which it exhibits on its face and in the size and nature of its subscription list.[10]

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[9] It nowhere appears that the exclusion in question was made part of the Act because Congress thought it necessary to exempt all "usual" newspapers in order to comply with the First Amendment. It appears rather that those newspapers referred to as "bona fide" were considered to be those outside the regulatory intent of the Act. For example, the "bona fide newspaper" exclusion is part of a list which concludes with "such other persons not within the intent of this paragraph, as the Commission may designate . . ." See note 5, *supra*.

[10] The appellee, assuming that the Act is not applicable to a newspaper which offers advice about specific investment opportunities in a regular feature, such as an individual column on a financial page, suggests that its own activities are no more than the same practice on a larger scale. While we express no opinion concerning the practices of other publications, differences in the manner or extent to which a publication offers investment information may very well be relevant to the Act's regulatory purpose. Cf. *In re Darvas*, 210 N.Y.S.2d 332 (Sup. Ct. N. Y. Co. 1960); aff'd 13 A.D.2d 75, 213 N.Y.S.2d 108 (1st Dept.); rev'd 10 N.Y.2d 108, 217 N.Y.S.2d 603; cert. denied 368 U.S. 947 (1961).

It seems to us that the *Transcript* does not necessarily fit within this exclusion. Most of its published material consists of reprinted reports assessing various securities issues. The exhibits furnished to the court all devote nearly one-half of the front page and part of the second to an index to the contents which lists various companies by name. Each issue contains a similar cumulative index covering some extended period of time. This characteristic emphasis on particular issues and companies at the very least raises doubt about whether the *Transcript* is outside the exclusion—a suspicion which we believe that the S.E.C. should be allowed to investigate.

The parties implicitly recognized the importance of discussing the publication's practices in the "indicia" which they stressed during oral argument as the attempt to define the "usual" newspaper grew more elaborate: for example,[11] that the *Transcript* is not paid for its circulation of material by the brokerage houses whose reports it publishes, and that it determines the location of various articles in a particular issue upon the basis of its editor's news judgment alone. The truth of this assertion would be highly relevant to a determination of whether or not a publisher expects to induce readers to act directly upon certain investment advice; but whether or not it is so cannot be ascertained from a copy of the publication itself. It is immaterial to the principal issue in this case whether

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[11] In oral argument before this court, the appellee answered Commission challenges by stating for the first time that "the Transcript has porters, including Mr. Holman who works full time," and that it "utilizes two wire services." It also represented that the *Transcript* does not receive any compensation for reporting and printing any matter or for positioning it in a particular place in the publication itself.

or not the "usual newspaper" is paid for using the news items which it publishes, if they are not offered as investment advice. What matters is whether or not a specific publication is engaged in practices which the Act was intended to regulate, such as the offering of professional investment advice without revealing the possibility of personal gain to the publisher from what he reports or how he presents it. See *SEC* v. *Capital Gains Research Bureau, Inc., supra.*

Nor can it be determined from its face that the *Transcript* is a "bona fide newspaper" within the meaning of this Act simply because, as the appellee suggests, it publishes financial "information." Any investment adviser, including one engaged in the most nefarious of practices, offers "information" to his clients; and any such adviser might choose to present it in the guise of traditional newspaper format. The type of printing and paper used, the employment of a certain number of reporters, the hiring of wire services, and the fact that "information" is offered and circulated generally would not necessarily reveal anything about the commercial practices involved or the financial interests served in its publication. It would be totally inconsistent with the purpose of the Act to hold that the exclusion would permit an unscrupulous operator to forestall investigation by arguing at a subpoena enforcement proceeding that his publication had enough of the trappings of a newspaper to prevent any inquiry into the practices involved in its publication and sale to investors. The Act's exclusion of a "bona fide newspaper" does not require a definitive description of a "typical newspaper."[12]

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[12] In addition, contrary to appellee's assertions, the interpretation of an exclusion in the Investment Advisers Act is not controlled by definitions of "newspaper" formulated as part of the construction of a different statute with a separate purpose. See, *e.g.*, *United States* v. *Arnold*, 380 F.2d 366 (4 Cir. 1967); *United States* v. *Kelly*, 328 F.2d 227 (6 Cir. 1964); *United States* v. *Azar*, 243 F. Supp. 345 (E.D. Mich. 1964).

Moreover, it is not necessary to enlarge the category of "bona fide" newspapers into an exclusion for all publications which could conceivably be brought within the term "typical newspaper" in order to avoid the "seeds of a constitutional controversy" which the appellee argues would result from an attempt to regulate the conduct of any newspaper publisher. As Justice Harlan pointed out in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 150 (1967):

> "A business 'is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws . . .' Federal securities regulation, mail fraud statutes, and common-law actions for deceit and misrepresentation are only some examples of our understanding that the right to communicate information of public interest is not 'unconditional.'" (Citations and footnote omitted.)

The Investment Advisers Act does not on its face abridge freedom of the press simply because it may be applied to publications which are classified formally as part of the "press" for some purposes but are not "bona fide newspapers" excluded under the Act. It is not necessary to base a construction of the Act on the assumption that the activities involved in giving commercial investment advice are entitled to the identical constitutional protection provided for certain forms of social, political or religious expression. As one court has put it:

> "Promoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect. As a rule, it does not affect the political process, does not contribute to the exchange of ideas, does not provide information on

> matters of public importance, and is not . . . a form of individual self-expression. It is rather a form of merchandising subject to limitation for public purposes like other business practices."

Banzhaf v. *FCC*, 405 F.2d 1082, 1101-1102 (D.C. Cir. 1968), *cert. denied* sub nom. *Tobacco Institute, Inc.* v. *FCC*, 38 U.S.L.W. 3117 (1969). See *New York State Broadcasters Ass'n Inc.* v. *United States*, 414 F.2d 990, 998 (2 Cir. 1969); *Halsted* v. *SEC*, 182 F.2d 660, 668-669 (D.C. Cir. 1950); Note, *Freedom of Expression in a Commercial Context*, 78 Harv. L. Rev. 1191 (1965); cf. *SEC* v. *May*, 229 F.2d 123 (2 Cir. 1956).

Determining whether a specific newspaper is "bona fide" for the purposes of the Act requires the delineation of a boundary between the special type of "merchandising" activities which must lead to registration and the publication of expression which lies beyond the Acts regulatory purposes. Since the *Transcript's* practices have not yet been explored, neither this court nor the district court is presently in an appropriate position to attempt to draw such a line. But the distinction required by the words "bona fide" in the Act, when made, will be based on a study of the context in which the activity or expression in question occurs. The process by which a proper categorization is reached will therefore parallel the investigation appropriate to a determination of whether a particular activity is a restricted practice or a form of expression protected by the First Amendment. See, e.g., *United States* v. *O'Brien*, 391 U.S. 367, 376-382 (1968); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Mills* v. *Alabama*, 384 U.S. 214 (1966); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942); see generally Emerson, *Toward a General Theory of the First Amend-*

ment, 72 Yale L.J. 877 (1963); cf. Note, *Symbolic Conduct,* 68 Colum. L. Rev. 1091 (1968). Thus no constitutional conflict is inherent in the fact that an investment advisory "newspaper" which is not "bona fide" might be required to register.[18]

The district court incorrectly concluded that the Act mandates its determination that the *Transcript* is excluded from coverage. This result cannot be supported upon the grounds cited, that the *Transcript* on its face offers "virtually an unrebutted showing that it is a bona fide newspaper and financial publication" and that the First Amendment would not permit any other conclusion. Although the Commission has not suggested that it now possesses evidence that the *Transcript* is engaged in practices which would ultimately deny it the benefit of the "bona fide newspaper" exclusion, the publication's right to this exclusion under the Act cannot be called self-evident upon the basis of a "virtually unrebutted showing" which reveals little about the presence or absence of such practices.

It therefore follows that the principles established in *Oklahoma Press Pub. Co.* v. *Walling, supra,* are controlling in this case. The Commission is particularly familiar with the many guises which practices in the securities

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[18] A conflict is not introduced simply by designating the Act a form of "licensing statute," without regard to the nature of the activities or expression involved, as the appellee argues. If a publication is "bona fide" under the Act and within the First Amendment's protection of expression, it will not be subject to regulation or "licensing." And even if a newspaper is engaging in commercial practices which may be regulated, the Act grants no authority for review or censorship by the Commission of investment advisory material prior to its publication. Cf. *Near* v. *Minnesota, ex rel. Olson,* 283 U.S. 697 (1931).

markets may assume, and it is best suited to make the determination of "bona fide" newspaper status in the first instance. At this stage the district court should not embark upon such a wide scope of inquiry as may be needed for that purpose. There is no reason to believe that the Commission will not be fully aware of the importance of First Amendment consideration when it interprets and applies the Act's exclusion.

The appellee suggests however, that the *Oklahoma Press* principles should be modified because, assuming it is in fact a "bona fide" newspaper, the investigation contemplated would chill its exercise of constitutionally protected rights of expression while in progress. For this reason, it urges, a court should itself determine coverage. The court below agreed in effect, citing the particularly chilling effects of investigations which inquire about news sources and subscribers. The appellee contends that such a probe, which might seek some of its most confidential operating information, would both deter its own editorial criticism of the Commission [14] and intimidate its subscribers and sources of information.

Nevertheless, we do not conclude that any investigation of a "bona fide" newspaper by the Commission pursuant to the Act would so circumscribe its expression during the

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[14] While the appellee contends that the "only permissible inference is that this investigation is designed by the SEC to throttle the criticism leveled against it by the *Transcript*" and thus "to destroy an old opponent," it appears that no significant editorial criticism of Commission activities, if any, was printed prior to the beginning of the present investigation. Indeed, the Commission alleges that the *Transcript* contained no editorials whatsoever during the first two years of its existence, 1963-1965.

interim that a court must make the initial determination of coverage. While the chilling effect doctrine may in some cases be applied to affect principles of judicial review of the administration of a federal statute, see *Wolff* v. *Selective Service Local Board 16*, 372 F.2d 817 (2 Cir. 1967); Note, *The Chilling Effect in Constitutional Law*, 69 Colum. L. Rev. 808, 830-832 (1969), the fact that a demand for disclosure may have some deterrent effect upon speech does not automatically invalidate it. See *Communist Party of the United States* v. *Subversive Activities Control Bd.*, 367 U.S. 1, 91 (1961); *Barenblatt* v. *United States*, 360 U.S. 109, 125-134 (1959). See also *W. E. B. DuBois Clubs of America* v. *Clark*, 389 U.S. 309, 313 (1967).

It has not been shown that the production contemplated by this subpoena would restrict the *Transcript's* expression more than the administrative investigation of a newspaper approved as consistent with the First Amendment in *Oklahoma Press, supra*, 327 U.S. at 192-193.

In the first place, the subpoena does not "go to the jugular of the *Transcript* as a publishing firm" merely because it asks for the production of certain correspondence and advertising materials which appear to be directly related to an investigation of the type of practices which might cause a newspaper to fall outside the Act's exclusion. No dragnet is cast for lists of all subscribers; instead, the information sought is much like that subpoenaed in *Oklahoma Press* itself.[15] Contrast *NAACP* v. *Alabama*, 357 U.S. 499 (1958).

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[15] The subpoena enforced in *Oklahoma Press* required production, *inter alia*, of

(*Footnote continued on following page*)

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The alternative method by which the Commission might have attempted to investigate the commercial activities of the *Transcript* would have been more likely to threaten a chilling of free expression than would compliance with the subpoena in question. The Commission might have addressed separate queries to all the securities industry institutions which supply the material the *Transcript* publishes, or to the investment community members likely to be among its more prominent subscribers. Such a probe could have generated rumors which might have been much more difficult to counteract, and much more damaging, than the private investigation in question.[16] Cf. *Dombrowski* v. *Pfister,* 380 U.S. 478 (1965).

(footnote continued from preceding page)

". . . all your books, papers and documents showing the distribution of papers outside the State of Oklahoma, the dissemination of news outside the State of Oklahoma, the source and receipt of news from outside the State of Oklahoma, and the source and receipt of advertisements of nationally advertised goods." 327 U.S. at 210 n. 46.

The subpoena in the present case does not differ in its effect from that in *Oklahoma Press* because enforcement, like the Act's regulation, is "pursuant to a licensing statute," see n. 13, *supra.* The appellee concedes that it would be entirely proper for the Commission to investigate the commercial practices of any type of newspaper in connection with specific activities thought to violate anti-fraud provisions of the Securities Act of 1933 or the Securities Exchange Act of 1934. There could be no substantial difference between the effect of such an investigation and enforcement of a subpoena under the Investment Advisers Act, even though the ultimate sanctions under the statutes are not the same.

[16] The Commission's order authorized a private investigation, and §210(b) of the Act provides that its staff cannot disclose any information obtained in such an investigation without further Commission authorization.

Appendix A

If the production of materials sought by the Commission's subpoena in this case does threaten any unusual disruption of the *Transcript's* normal operations, the appellee is, of course, free to ask the district court for appropriate protective limitations. See *Oklahoma Press, supra.*

Reversed and remanded.

DANAHER, *Senior Circuit Judge* (concurring in remand):

In this case, presenting an issue of first impression, the parties have dealt inadequately with what I think is a basic aspect. Most importantly under the circumstances presented, I feel we are bound to take account of the Congressional declaration that certain entities and individuals have *not* been included as investment advisers as defined in section 202(11) of the Investment Advisers Act.

Senate Report 1775 from the Committee[1] on Banking and Currency will be found in full commencing at page 10071, Congressional Record, Volume 86, Part 9, 76th Congress, 3d Session. As the Report shows, after extensive hearings at which much opposition had been voiced, the subcommittee recessed while the Commission,[2] spokesmen

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[1] That Committee included Chairman Wagner, Senator Carter Glass (a noted publisher and financial expert), Senator James F. Byrnes (later Supreme Court Justice and Secretary of State), Senator Francis Maloney, Senator Robert A. Taft and others of wide experience in the business and financial world.

[2] The Commission functioned under its Chairman, the late Jerome Frank, thereafter a valued member of this Court, and other noted members such as Leon Henderson and Sumner S. Pike. After protracted conferences had resolved opposition, the major interested parties joined in a statement *urging passage* of the legislation. Cong. Record, *ubi supra*, p. 10077.

for various interests, and the Committee staff conferred and worked out the terms of the bill.[8] Compromise and agreement having been reached, both branches of Congress then unanimously passed H.R. 10065, a bill identical to S. 4108.

So it was that Senate Report 1775 analyzing the provisions of the pending legislation set forth at Congressional Record page 10077:

> "Findings and definitions: Sections 201 and 202 contain, respectively, the findings of the Congress with respect to investment advisers and the definitions of various terms used in title II. *The term 'investment adviser' is so defined as specifically to exclude banks, bank holding-company affiliates, lawyers, accountants, engineers, teachers, brokers* (insofar as their advice is merely incidental to brokerage transactions for which they receive only brokerage commissions), *publishers of bona fide newspapers, news magazines, or financial publications of general and regular circulation,* and persons whose advice is limited to securities issued by the United States and certain instrumentalities of the United States. In addition, the *Commission is authorized*

[8] Mr. Justice Goldberg in *S.E.C.* v. *Capital Gains Bureau*, 375 U.S. 180 (1963) drew upon Senate Report 1775 in outlining the background for the Court's consideration of the question presented in that case which had been heard *en banc* in this Court. 306 F.2d 606 (1962). The Supreme Court decided that a registered investment adviser, being a person "who, for compensation, engages in the business of advising others" (375 U.S. 187, n. 15) charged with "scalping" could be required to make full disclosure to his clients. The case did not deal with the question here presented. And see *Marketlines, Inc.* v. *Securities and Exchange Commission*, 384 F.2d 264 (2 Cir. 1967).

by rules and regulations or order *to make certain further exceptions according to prescribed* statutory standards." (Emphasis added.)[4]

Seldom will we find more knowledgeable participants, notes 1 and 2, *supra*, than those who evolved this legislation. Clearly their wording was meaningful, but it seems to me my colleague is saying that when Congress adopted the exclusionary language, it was the same as leaving it out of the Act. Observing that the case was "close," the District Judge seems to have sought to steer a course between the position of the Transcript that the Commission had no jurisdiction[5] whatever to undertake the investigation, and the Commission's insistence that it, and it alone, possessed the power of decision.

I

The Commission's July 27, 1967 order directing an investigation recited that the "Holman Co." had been expelled from membership in the NASD and that Richard A. Holman was a "cause" for that order. The Commission further recited that it had information tending to show that Holman is the publisher and editor of the Transcript, he controls the Transcript Corporation, the Corporation was making use of the mails in connection with the sale of the Transcript to the public and that, without having filed for registration with the Commission, the Transcript "is an investment advisory publication and the Corporation is therefore an investment adviser within the meaning

[4] And see section 202(a)(11) of the Act.

[5] But surely the publisher of a paper has no special immunity from laws applicable to business in general. *Associated Press* v. *Labor Board*, 301 U.S. 103, 130, 132-133 (1937).

of the term under the Investment Advisers Act of 1940." Thus the order directed that an investigation be conducted pursuant to §§209(a) and (b) of the Act to ascertain the possible existence of a violation of §203 of the Act.

The subpoena *duces tecum* was directed to "Wall Street Transcript Corporation by Richard A. Holman" calling for testimony "In the Matter of Wall Street Transcript Corporation and Richard A. Holman."[6] The subpoena sought the production, not merely of "certain correspondence and advertising materials," but

> "*All of the following* relating to the business of Wall Street Transcript Corporation during the period from January 1, 1967 until the present:
>
> 1) Copies of *all* advertisements, notices, circulars, newspaper articles and any other writings used in connection with the sale of The Wall Street Transcript.
>
> 2) *All correspondence* with subscribers and prospective subscribers to The Wall Street Transcript.
>
> 3) *All* documents, agreements, memoranda, correspondence and *any other writings* relating or containing reference to the obtaining of reports, comments, management speeches and any other written materials for publication in The Wall Street Transcript." (Emphasis added.)

The District Judge recognized the "all-encompassing nature of the subpoena sought." Undoubtedly his percep-

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[6] Neither in the Court below nor at argument nor on brief here has it been suggested that the Commission sought an investigation of Holman.

tion in this respect entered into his denial of the motion for enforcement. Rather than an outright refusal to lend the aid of the Court to the Commission's demand, under the circumstances of this case, I think he should have called for a showing as to the particular factors upon which the Commission's administrative judgment would turn.[7] In the failure to do so, as it seems to me, lay error. Section 209(c) provides that "the Commission may invoke the aid" of the Court and that the Court "may issue an order."[8] Thereafter, not the demand of the subpoena but the terms of the Court's order, if warranted, would have controlled the course of the investigation. Unless it could be made to appear that the Transcript was *not* the publisher of a "bona fide newspaper" or of a bona fide "news magazine," or of a bona fide "business or financial publication of general and regular circulation," the court was free to withhold an enforcement order.

II

Of course, as our able colleague points out, in the ordinary case of an investigation conducted by an administrative agency, no showing of probable cause need be made

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[7] In view of the scope of the demands of the subpoena and as bearing upon what information might be deemed relevant, Commission counsel was questioned from the bench during the argument of this appeal. Counsel failed to specify the factors upon which the Commission's administrative judgment might be exercised.

[8] *Shasta Minerals & Chemical Co.* v. *Securities & Exch. Com'n*, 328 F.2d 285 (10 Cir. 1964).

to the District Court unless a statute indicates otherwise.[9] But this was not a proceeding under the Securties Act of 1933 or that of 1934. This situation arose under the Investment Advisers Act, and its terms must be regarded. Here Congress has interposed a series of limitations, and in specific language, *supra*. The Commission in effect would have us say that its powers are unlimited. The Supreme Court speaking through Mr. Justice White in *See* v. *City of Seattle*, 387 U.S. 541, 544 (1967), has distilled from its earlier cases the rules to be stated thus:

> It is now settled that, when an administrative agency subpoenaes corporate books or records, the

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[9] Rejecting there the imposition of a "probable cause" standard, the Court in *United States* v. *Powell*, 379 U.S. 48, 56 (1964), protected its holding thus: "*Without some solid indication* in the legislative history that such a gloss was intended, we find it unacceptable." (Emphasis added.) Here we have that "solid indication."

Again, in *Okla. Press Pub. Co.* v. *Walling*, 327 U.S. 186, 215-216 (1946), the Court found the "showing" sufficient, noting that the Congress had made no requirement of *any* showing of probable cause. No "standards for administrative action which the judiciary first had to weigh and appraise" had been set by Congress, as Justice Douglas noted, dissenting in *United States* v. *Powell*, *supra*, at 59, citing *United States* v. *Morton Salt Co.*, 338 U.S. 632 at 654 (1950).

Here by its exclusionary language, *supra*, Congress clearly differentiated each of several classes from those who otherwise would come within the definition of "investment adviser." I suggest that the limiting language clearly demonstrates the need for such a showing as will justify the conclusion that the entity is no longer entitled to the exclusion, e.g., that the "performance of such services" by a lawyer is not "solely incidental to the practice of his profession." Or that the broker has indeed received "special compensation" for "such services."

> Fourth Amendment requires that the subpoena *be sufficiently limited in scope, relevant in purpose,* and *specific in directive* so that compliance will not be unreasonably burdensome.[5] (Footnote omitted.) The agency has the right to conduct all reasonable inspections of such documents which are contemplated by statute, but *it must delimit the confines of a search by designating the needed documents in a formal subpoena.* In addition, while the demand to inspect may be issued by the agency in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field, and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply. (Emphasis supplied.)

The findings of the District Judge are spelled out in *Securities & Exch. Com'n* v. *Wall Street Transcript Corp.*, 294 F. Supp. 298 (1968) at pages 304-306. The evidence upon which he relied and the transcript of argument before him are part of our record, and fully support his ultimate conclusion:

> Upon the available evidence, the Transcript appears to be *a bona fide "financial publication of general and regular circulation."* Ibid. 306.[10] (Emphasis mine.)

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[10] That conclusion is sufficient for our purposes, especially since we need not, indeed should not, reach a First Amendment issue where adequate ground otherwise exists for disposition of the case. Judge Tyler had further observed that the Transcript has all the usual indicia of a newspaper, noting also that the SEC had furnished no persuasive evidence to the contrary.

I agree. That conclusion is specific, directly follows the statute and involves no "newspaper" discussion.

III

So, as Mr. Justice White pointed out in the *See* case, *supra*, the agency "must delimit the confines of a search by designating the needed documents in a formal subpoena." That instrument, to avoid abuse of the court's process, must be "sufficiently limited in scope, relevant in purpose, and specific in directive." (And see 294 F. Supp. at 307.)

Moreover the subpoenaed party "may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply."

Accordingly, in the circumstances of this case and for the reasons I have adduced, I would remand for a hearing. The District Judge should require that the Commission satisfy him as to what are the "needed documents," relevant to what purpose, and how specifically they may be pertinent to support the claim in the Commission's original order and application for the Court's aid. That order predicated the Commission's investigation on the claim that the Transcript "is an investment advisory publication" and that it is "an investment adviser" within the meaning of the Act. The Commission must have had some factors in mind upon which to base its allegation and its conclusion, however tentative. Let the Court become satisfied that its aid is required, that its order may be tailored to the *need* to be *demonstrated*.

For the Court to yield otherwise is to ensconce "administrative absolutism" at its unreachable zenith. I cannot believe that Congress intended any such result, and thus I respectfully differ from my colleagues.

Appendix A

Opinion of the United States District Court

(Filed—November 26, 1968)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In the Matter of an Application to Enforce Administrative Subpoena Duces Tecum of the SECURITIES AND EXCHANGE COMMISSION,

Applicant,

—against—

WALL STREET TRANSCRIPT CORPORATION
by RICHARD A. HOLMAN,

Respondent.

SECURITIES AND EXCHANGE COMMISSION

By MAYLON M. FRANKHAUSER, New York Regional Administrator,

RICHARD V. BANDLER, Associate Regional Administrator,

EDWARD H. NORDLINGER and MURRAY L. FINEBAUM, Attorneys.

POLLACK, GREENSPOON & SINGER, EQS., New York City,
By SAMUEL N. GREENSPOON, ESQ.,
Attorneys for Respondent.

TYLER, D.J.

Appendix A

This is a motion by the Securities and Exchange Commission ("SEC") for an order pursuant to Section 209(c) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-9(c), requiring the respondent to appear and testify and to produce certain documents to be described hereinafter.

Since this motion raises interesting and troublesome questions concerning the comparatively broad powers of the SEC to investigate under the Investment Advisers Act of 1940, it is desirable that the background of the issuance of the subpoena in question, the arguments of the parties and the facts adduced for and against the motion be set forth in some detail.

The Order of Investigation and the Resultant Subpoena

Pursuant to the relevant provisions of the Act and in order to determine whether violations of the Act had occurred, the SEC on July 27, 1967 issued a formal order directing that an investigation be made into the matter of the Wall Street Transcript Corporation ("Transcript"). The order designated certain named agents and officers of the SEC to conduct the investigation and empowered them to "administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other materials deemed relevant and material to the inquiry". Pursuant to this order, one of the officers of the SEC named therein, Richard V. Bandler, issued a subpoena duces tecum to the respondent on March 18, 1968 requiring respondent by its president, Holman, to appear in the

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Commission offices in New York on April 1, 1968.[1] A few days prior to the return date, counsel for respondent by correspondence and perhaps oral communications as well, endeavored to persuade the SEC to withdraw the subpoena and to drop the investigation. These efforts continued through the month of April and apparently into May and June of this year. Finally, the return date for the subpoena was rescheduled for July 29, 1968, on which day Holman appeared and refused to answer any questions or to give any information other than his name, business and home addresses and telephone numbers. Thereafter, the SEC, accepting that respondent effectively refused to honor the subpoena, brought on this motion which, as the statute makes clear, is permissible in order to invoke the contempt powers of this court.

Parenthetically, it should be noted that the formal order of the SEC heretofore mentioned recites that, ac-

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[1] The subpoena required and requires production of the following documents:

> All of the following relating to the business of Wall Street Transcript Corporation during the period from January 1, 1967 until the present:
>
> 1) Copies of all advertisements, notices, circulars, newspaper articles and any other writings used in connection with the sale of The Wall Street Transcript.
>
> 2) All correspondence with subscribers and prospective subscribers of The Wall Street Transcript.
>
> 3) All documents, agreements, memoranda, correspondence and any other writings relating or containing reference to the obtaining of reports, comments, management speeches and any other written materials for publication in The Wall Street Transcript.

cording to the SEC's public official files, in September, 1958 a firm known as R. A. Holman & Co., Inc. was registered with the Commission as a broker and dealer, that Richard A. Holman, the same man who is president of the respondent here, was the president of Holman & Co. and that thereafter on December 15, 1965 the Commission revoked the registration of Holman & Co., expelled it from membership in the National Association of Securities Dealers, made permanent a temporary suspension of a Regulation A exemption and found that Holman, among others, was a cause for its order with respect to Holman & Co.

The Applicable Statutory Provisions

Section 209(b) of the Act provides:

> "For the purposes of any investigation or any proceeding under this title, any member of the Commission or any officer thereunder designated by it is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements or other records which are relevant or material to the inquiry."

Section 209(a) of the Act further states:

> "Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title or any rule or regulation prescribed under the authority thereunder, have been or are about to be violated by any person it may in its discretion require, and in any event shall permit, such person to file with it a statement in writing, under oath or

otherwise, as to all the facts and circumstances relevant to such violation, and may otherwise investigate all such facts and circumstances."

As previously stated in brief, Section 209(c) of the Act makes provision for the SEC to enforce its subpoenas by applying to a federal court:

> "In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of ... records... ".

This particular section goes on to provide that the court may issue an order requiring such person to appear, produce records and testify on the matter under investigation and that the failure to obey any such order of the court may be punished by the court as a contempt thereof.

Of importance to the issues here, Section 202 of the Act defines those persons who are deemed investment advisers thereunder as follows:

> " 'Investment adviser' means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include... (D) the publisher of any bona fide news-

paper, news magazine or business or financial publication of general and regular circulation; . . . ."

The Contentions of the Parties

In support of its motion, the SEC submits that its subpoena and investigation are valid and clearly within the scope of its authority as conferred by Section 209(c) of the Act, see *Oklahoma Press Publishing Company* v. *Walling*, 327 U.S. 186, 208-216 (1946), that production of the records called for in this particular subpoena is reasonable and necessary and that the subpoena requirements are not unduly oppressive and burdensome. More particularly, the SEC asserts that it is premature for respondent to contend that it is a bona fide newspaper or financial publication specifically excluded by the provisions of Section 202 of the Act. Put differently, the SEC contends that even though its investigation may develop that respondent is a bona fide newspaper or financial publication, that is a question to be determined in the first instance by the Commission and not by this court. Finally, the Commission opposes respondent's argument that if this investigative subpoena be deemed valid on the face of the Act, then the Act insofar as it pertains to respondent is unconstitutional in that it deprives respondent of its First Amendment freedoms.

It is germane to consider the submission of the SEC and its affidavits in support of this motion. The Commission does not recite that it has any complaints or specific information to the effect that the respondent is acting or may be acting as an investment adviser without registering as such as required by the Act. Rather, the SEC restricts itself to the following rather limited factual submissions:

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1. In a supplemental affidavit filed by a Commission attorney, various advertisements of the respondent which have appeared in other newspapers are set forth, along with allegations of the affiant to the effect that these advertisements indicate that the Transcript has held itself out to the public as an investment advisory publication.

2. The SEC suggests that the contents of various issues of the Transcript handed up to the court and made part of the record on this motion indicate on their face that the Transcript holds itself out as an investment adviser.

3. Admitting that the Transcript devotes a major portion of each issue to reprinting market comments by clearly identified broker-dealer firms and their analysts, the SEC submits that the Transcript exercises "some selectivity in determining what material will be presented to its readers". Thus the Commission expresses concern that selectivity may mean that the respondent is seeking to advise more than it is to inform.

For its part, respondent has submitted affidavits and a brief in opposition to the subpoena and investigation. In substance, respondent urges that the SEC has no jurisdiction to investigate its affairs or to issue the subpoena; that the subpoena was and is not authorized by the Act; that the investigation and issuance of the subpoena are not within the power of Congress to authorize; and that the subpoena in any case is unnecessarily broad, coercive, harassing and in derogation of the First and Fourth Amendment rights of the respondent.

Discussion, Findings and Conclusions

The broad question presented by this enforcement motion of the SEC is whether or not the inquiry is lawful.

Appendix A

I assume that, as the SEC argues, the burden of proving that the investigation is unlawful is upon the respondent. See *Mississippi Road Supply Co.* v. *Walling,* 136 F. 2d 391 (5th Cir. 1943). Historically, the courts have been reluctant to interfere with agency investigations where the inquiry is reasonably within the statutory powers and scope of the agency as set out by Congress. In *Oklahoma Press Publishing Company* v. *Walling,* 327 U. S. 186 (1946), the Supreme Court ruled that an investigative subpoena issued by a federal agency with enforcement powers is valid if it satisfies three criteria:

1. "The disclosures sought shall not be unreasonable . . ." 327 U. S. at 208;

2. "The investigation be for a lawfully authorized purpose within the power of Congress to command . . ." *Id.* at 209; and

3. The investigating officer "shall not act arbitrarily or in excess of his authority . . ." *Id.* at 216.

More recently, the Supreme Court has held that administrative agency subpoenas should be enforced where an investigation is conducted pursuant to a legitimate purpose, where the inquiry made is relevant to such purpose and seeks to elicit information not already within the knowledge of the agency ". . . and, of course, where enforcement of the subpoenas does not constitute an abuse of the court's process." *United States* v. *Powell,* 379 U. S. 48, 58 (1964).

In the light of these authorities, this court must determine whether or not respondent has carried its burden of establishing that the SEC's present inquiry is in excess of its authority, or not within the power of Congress to permit or command, or unreasonably oppressive; moreover, this court must be certain that enforcement of

the subpoena does not lead to abuse of its process. Since the Commission has received no complaints concerning the Transcript as an investment adviser and has offered no evidence other than the aforesaid issues of the Transcript and its advertisement in other periodicals, the inquiry must be focused on the Transcript itself—and upon the undisputed information concerning its publication and distribution. It is here that the answer to perhaps the most disputed factual issue raised on this motion—whether or not the Transcript is a bona fide newspaper or financial publication—presumably may be found. But important as this last question may be, there is a threshold problem which may be as important and more difficult. As indicated, the first thrust of respondent's submission is that this court, not the SEC, must decide whether or not the Transcript is one of the class excluded by Section 202 from coverage by the Act. Conversely, the Commission urges that the question of "coverage" by the Act of respondent and its activities is "prematurely raised" before the court or, more precisely as I view it, that the question of coverage under settled federal law is left to the agency for initial determination. See 1 Davis, Administrative Law, § 3.12, at p. 220, and cases therein cited.

There is much to be said for the proposition that the SEC should be permitted to investigate upon the theory that its special competence in the field is precisely that which Congress means to be determinative of such questions as to who is and who is not an investment adviser embraced by the Act. Also, as suggested above, there is a substantial line of cases which hold that a federal district court, on a motion to enforce an administrative subpoena, is not to inquire into the issue of coverage—i.e. whether the statute under which the agency purports to act "covers" the firm or person against whom the agency

is acting. *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501 (1943); see also Davis, *supra*. As Davis makes clear *Endicott Johnson* and the progeny which it has spawned normally preclude district courts from deciding the issue of coverage before the administrative agency has had an opportunity to rule on that issue. The Supreme Court's ruling in *Endicott Johnson* in effect was reaffirmed in the later case of *Oklahoma Press Publishing Co.* v. *Walling*, and again more recently in *United States* v. *Powell*, both referred to earlier in this opinion.

In my view, however, none of these precedents is on all fours with the circumstances presented in this case. The coverage cases have involved, for the most part, relatively clear-cut problems of jurisdiction of the agency to carry out a particular investigation—i.e. they have dealt with respondents whose activities, at least in the general sense, clearly lay within the jurisdiction of the agency seeking judicial enforcement of an investigatory subpoena. In none of those cases which I have read did it appear that the enforcement of the subpoena would involve the possible violation of First Amendment rights. Clearly, the SEC seeks to enlist court assistance in obtaining the names of subscribers, advertisement techniques and the sources of information and reports printed in the Transcript, which are the vital organs of any publishing enterprise. I believe, therefore, that the Commission's possible intention to apply the Act to what appears to be a bona fide newspaper "carries the seeds of a constitutional controversy", *United States* v. *Rumely*, 345 U. S. 41, at 43 (1952), and that thus this is not a typical "coverage" case to be decided by the SEC rather than the court under the doctrine of *Endicott Johnson*.

It is true that in *Oklahoma Press Publishing Co.* v. *Walling*, *supra*, Mr. Justice Rutledge, writing for the ma-

jority, expressly rejected petitioners' principal argument that the free press clause of the First Amendment precluded "any possible application of the Fair Labor Standards Act to the business of publishing and distributing newspapers". 327 U. S. at 192. Nevertheless, I conceive the circumstances and issues of that case to be substantially distinguishable from the present controversy. In *Oklahoma Press*, the Court was concerned with a subpoena duces tecum which, although it included a demand for documents bearing on the question of coverage by the statute, was more narrowly drawn than the present subpoena of the SEC. Also, the exclusionary or exempting provisions of the Fair Labor Standards Act (Section 13(a)) indicated on their face a clear Congressional intention to cover employees of certain types of publications or newspapers such as petitioners. Most important, as the majority opinion observed, it was obvious that the Fair Labor Standards Act and the investigation thereunder sought was directed at a specific problem of elimination of low wages and long hours; thus, in the words of Mr. Justice Rutledge, "(t)he (First) Amendment does not forbid this or other regulation which ends in no restraint upon expression . . ." 327 U. S. at 193. In the case at bar, I reason that the Commission's broad inquiry under the Act can end only in restraint of expression by the Wall Street Transcript. If a newspaper operates under the threat of disclosure to a government agency of its news sources and subscribers' identities, for example, it will be cautious, to say the least, about what it prints. Its "caution" will only increase when its advertisers become apprehensive and its subscribers become intimidated by government scrutiny. This is classic restraint of expression which needs no further elaboration here. Plainly, neither the First Amendment nor the powers conferred by Congress in the Act upon the SEC permit an inquiry which

can only lead to such a restraint of expression by a newspaper. Finally, as is at least implicit from what has already been said, under the unusual circumstances here presented, this court must decide the question of "coverage."

As the parties' arguments suggest, the problem of coverage has two dimensions, one statutory and the other constitutional. In actuality, the two may blend more closely than this opinion and the briefs of counsel have occasionally suggested; nevertheless, at least for purposes of discussion, the problem lends itself to this bifurcated analysis.

On the statutory level, respondent argues very simply that since it has shown that the Wall Street Transcript is a bona fide newspaper or financial publication, it necessarily follows that respondent is excluded from the Act's coverage—i.e. that Congress has expressly withheld from the Commission jurisdiction to investigate newspapers and financial publications. On the constitutional level, the Transcript urges that the all-embracing nature of the subpoena and the fact that the Act is a licensing statute establish that the Commission's investigation necessarily infringes its First Amendment rights. Thus, in order to evaluate these arguments, it is necessary to consider the nature of the Transcript as a publication and to examine the language and legislative history of the Act, and, most particularly, Section 202 thereof.

The Transcript is published every Monday in New York City. It is distributed through the mail[2] and at newsstands. A typical issue of the Transcript includes reports

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[2] The paper has a second-class postage permit from the United States Post Office Department.

issued by brokerage houses on various securities, news of offerings of bonds and stocks, speeches made by corporate financial and government personages, news concerning name changes of companies, news concerning executive promotions and transfers, news concerning mergers and acquisitions and editorials on various subjects with, it would appear, principal emphasis on financial and economic matters. As the SEC points out, the greater part of each issue included in the record seems to be devoted to securities reports prepared by analysts of various firms, whose names are clearly indicated at the heading of each report, in each case. These reports are accompanied by a rather large print caption on the first page of each issue to the following effect:

> "Note: For additional information about a report, write direct to the broker at address shown"[3]

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[3] Additionally, on the second page of each issue of the Transcript, the masthead page, the following disclaimer appears:

> "The Wall Street Transcript publishes security reports and comments of others in their entirety as a service to subscribers. The Wall Street Transcript does not in any way endorse or guarantee the accuracy or reliability of any of the information, statements, or opinions expressed in the reports by the firms who have written them. We take due care to transcribe accurately what has been written by others but because of the possibility of human and mechanical error, we cannot assume any liability for the correctness of the transcription. Errata, when discovered, are corrected. The Wall Street Transcript further points out that in the case of a report published by a broker-dealer, there is usually a statement which indicates that the report is not to be considered as an offer to sell or a solicitation of an offer to buy any security; that the

(Footnote continued on following page)

Appendix A

The Transcript commenced publication in June, 1963. It now has about 8,000 subscribers, including universities, libraries, corporations, individuals, trust companies, accounting firms, mutual funds, brokers, insurance companies and government agencies. From time to time, the Transcript places advertisements of its issues in the *New York Times,* the *Wall Street Journal* and various financial journals. As previously indicated, one of the attorneys for the SEC has submitted an affidavit suggesting that some of these advertisements on their face indicate that the Transcript is or may be an investment adviser. A typical advertisement of this kind is to be found as Exhibit I attached to the affidavit of Marvin E. Jacobs, Esq. Specifically, the SEC complains about the caption of this advertisement appearing in the *New York Times* Sunday September 17, 1967 issue. This caption in part reads: "What's Right for You . . . Now?" From this, the SEC would have

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(*Footnote continued from preceding page*)

material has been obtained from various sources but is not guaranteed as to accuracy or authenticity; that the report does not purport to include all the information available on the mentioned company or companies, as the case may be; that the firm which has written the report may have a position in the securities mentioned and may trade therein from time to time, and, further, that officers, directors or partners of the firm may be directors of or own securities of the company reported upon and may trade therein, and that no liability of any kind is assumed by the broker-dealer which has written the report for the accuracy of the information contained therein. We point out further that of course all opinions expressed are subject to change without notice. Neither the information, nor any opinion which may be expressed, constitute a solicitation for the purchase or sale of any securities referred to herein."

the court infer that the Transcript in a thinly veiled fashion purports to be making specific recommendations or advice for buyers of securities. Similarly, the Commission is concerned about the textual message, "You will be surprised how the Wall Street Transcript can help you maximize your profit potential". There are other matters to be found in this particular advertisement which counsel for the Commission does not mention. For example, right under the supposedly offensive caption to this advertisement is the text in relatively large print, "Your answer may be among these reports, comments and management speeches . . . in full original text . . . in the current issue of the Wall Street Transcript". At most, I construe such advertisements to suggest that an individual investor might be interested in some of the publications which are listed and which appear in a current issue of the Transcript. I cannot draw the sinister inference which the Commission apparently draws with respect to any of these advertisements. They are not substantially different from advertisements placed by other financial journals with, for example, newspapers of general circulation. Moreover, these advertisements do not appear to suggest or advise a potential investor in any way except for what I assume even the Commission would agree is the acceptable way of making financial information available through the Transcript. Specific securities are not touted by the Transcript. Not even special categories or types of securities are recommended. In sum, the Transcript seems to have a policy of printing speeches, analyses and articles about all manner of securities with "author credits" or bylines clearly indicated to the reader.

Upon the available evidence, the Transcript appears to be a bona fide "financial publication of general and regular circulation". Moreover, the Transcript has all the

usual indicia of a newspaper as that term is generally understood by the public and is normally used to indicate an entity protected by the free press clause of the First Amendment. *United States* v. *Kelly*, 328 F. 2d 227 (6th Cir. 1964); *United States* v. *Azar*, 243 F. Supp. 345 (E. D. Mich. 1964). The SEC has furnished no persuasive evidence to the contrary. Consequently, literal construction of Section 202 requires the conclusion that the SEC is attempting to investigate an entity which is excluded from the Act's coverage.

Nothing in the legislative history of the Act in general or Section 202 in particular suggests otherwise. In actuality, the legislative history is relatively uninformative respecting the precise issues raised on this motion. After a series of hearings wherein the views of the Commission and the investment industry were explored, the final bill which led to the Act, H.R. 10065, was reported out to a Committee of the Whole House for consideration. 86 Cong. Rec. 9807 (1940). In August, 1940, proceedings before the Committee led to little comment concerning the definition of "investment advisers" which is here relevant. See 86 Cong. Rec. 9808-9814. The debate in the Senate on August 8, 1940 was just as uninformative. It is true that reference to the definition of "investment advisers" was made in the report of the Banking and Currency Committee on S. 4108, a Senate precursor of H.R. 10065. There it was said, *inter alia*, that advisers are persons engaged in the business of advising others "or who for compensation and as part of a regular business issue or promulgate analyses of reports concerning securities". See 86 Cong. Rec. 10077 (1940).

The Act was finally passed on August 8, 1940 by the Senate. The above quoted portion of the Senate report, of

course, found its way into the defintion contained in Section 202. It is the basis of one of the SEC's arguments on this motion. In effect, the Commission argues, the Transcript as part of its regular business issues or promulgates analyses of reports concerning securities. Moreover, the SEC points out, correctly in my view, that the Transcript cannot bring itself within the exemption in Section 202(11)(C) of "any broker or dealer whose performance of such services (i.e. investment advice) is solely incidental to the conduct of its business as a broker or dealer". But, as I see it, this is beside the point. The Transcript is not "exempted" from the Act. It is excluded from the Act's coverage by virtue of its unrebutted showing that it is a bona fide "financial publication of general and regular circulation". Moreover, as informed observers in the field of securities regulation have observed, where a broker or dealer or other firm or person discloses the identity of the author of a financial report circulated by it, and such broker or dealer or firm does not adopt the report as its own, it would not seem to be a person who "issues or promulgates" the report within the meaning of the relevant language of the Act. Loss, Securities Regulation, Vol. II, page 1400 (1961).

Despite the dearth, if not total absence, of specific legislative history on the First Amendment issue, I believe that Congress, by the language it used in Section 202 of the Act, meant to avoid exceeding its powers in establishing the SEC's jurisdiction for regulating investment advisers. Put differently, it seems reasonable to infer that Congress was aware that it could not lawfully command or authorize regulation and licensing by the SEC of bona fide newspapers in the light of the teaching of the First Amendment. See *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. at 209; *United States* v. *Rumely*, 345 U.S. at 43-46; *Watkins* v. *United States*, 354 U.S. 178, at 197 (1957).

Appendix A

To find and conclude that the Transcript is clearly excluded from the Act's coverage may be a relatively easy task for the court on the present record, but the question remains, of course, as to whether *Endicott Johnson Corp.* v. *Perkins, supra,* and similar authorities heretofore discussed permit such action by a district court. Although I can find no affirmative precedents in point, I believe that the First Amendment issue here present leads inescapably to a determination that this court and not the SEC must decide the question of coverage. Traditionally, the federal courts have been sensitive to First Amendment rights and zealous to protect them when properly raised. The all-encompassing nature of the subpoena sought in this case by the SEC goes to the jugular of the Transcript as a publishing firm. Compliance with the subpoena, even if followed by an administrative determination of "non-coverage" by the Act, would work all the damage heretofore discussed as constituting an unconstitutional restraint on the free press as we know it. See *United States* v. *Rumely,* 345 U.S. at 57-58 (concurring opinion of Justice Douglas).

Of necessity, then, this court must stay the hand of the SEC now; it cannot follow the normal course of permitting the agency to decide, if only initially, the question of coverage. As suggested heretofore, the courts have a clear duty to anticipate and guard against deprivations of First Amendment rights. Also, by reason of their broader and more varied jurisdiction, federal district courts are better equipped than administrative or regulatory agencies to vindicate constitutional rights. Consequently, I conceive that it would be an abuse of this court's process and jurisdiction to put its imprimatur of approval upon the pervasive subpoena which is here directed against a newspaper and financial publication of general circulation. See

United States v. *Powell*, 379 U.S. at 58; Jaffe, *The Judicial Enforcement of Administrative Orders*, 76 Harvard L. R. 865, at 868-69 (1963).

To recapitulate, I do not hold that all persons and entities which claim exclusion from coverage by the Act are entitled to court-ordered insulation from investigation by the SEC. Similarly, I do not say that all such claimants are entitled to court determination of the preliminary issue of coverage. But where, as here, a publisher which presumptively is entitled to the protection of the First Amendment can make virtually an unrebutted showing that it is a bona fide newspaper and financial publication, a federal court should stay the hand of the investigating agency. An entirely different question would be presented if the SEC had complaints or other evidence of conduct by the publisher outside the normal functions of compiling and distributing an excluded publication. In the latter situation, I believe that the Commission should be entitled to proceed with court assistance under Section 209 if necessary, provided, of course, that the scope and particulars of the subpoena were not unreasonable or oppressive.

The motion for enforcement is denied. It is so ordered.

Dated: New York, N. Y.
November 22, 1968.

H. R. Tyler, Jr.
U.S.D.J.

APPENDIX B

United States Constitution

Amendment I

82nd Congress Senate Document 170, p. 40.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution

Amendment IV

82nd Congress Senate Document 170, p. 40.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution

Amendment V

82nd Congress Senate Document 170, p. 40.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a present-

ment or indictment of a Grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Investment Advisers Act of 1940

54 Stat. 847 (1940)

15 U. S. C. Sec. 80b-2(11)

(11) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include (A) a bank, or any holding company affiliate, as defined in section 221a(c) of Title 12, which is not an investment company; (B) any lawyer, accountant, engineer, or teacher whose performance of such services is solely incidental to the practice of his profession; (C) any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor; (D) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation; (E) any person whose

advice, analyses, or reports relate to no securities other than securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States, or securities issued or guaranteed by corporations in which the United States has a direct or indirect interest which shall have been designated by the Secretary of the Treasury, pursuant to section 78c(a)(12) of this title, as exempted securities for the purposes of the Securities Exchange Act of 1934; or (F) such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulations or order.

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54 Stat. 850 (1940)

15 U. S. C. Sec. 80b-3(a)(b)(c)(d)(e)

(a) Except as provided in subsection (b) of this section, it shall be unlawful for any investment adviser, unless registered under this section, to make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser.

(b) The provisions of subsection (a) of this section shall not apply to—

(1) any investment adviser all of whose clients are residents of the State within which such investment adviser maintains his or its principal office and place of business, and who does not furnish advice or issue analyses or reports with respect to securities listed or admitted to unlisted trading privileges on any national securities exchange;

(2) any investment adviser whose only clients are investment companies and insurance companies; or

(3) any investment adviser who during the course of the preceding twelve months has had fewer than fifteen clients and who does not hold himself out generally to the public as an investment adviser.

(c) Any investment adviser, or any person who presently contemplates becoming an investment adviser, may register under this section by filing with the Commission an application for registration. Such application shall contain such of the following information, in such form and detail, as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors:

(1) information in respect of—

(A) the name and form of organization under which the investment adviser engages or intends to engage in business; the name of the State or other sovereign power under which such investment adviser is organized; the location of his or its principal business office and branch offices, if any; the names and addresses of his or its partners, officers, directors, and persons performing similar functions or, if such an investment adviser be an individual, of such individual; and the number of his or its employees;

(B) the education, the business affiliations for the past ten years, and the present business affiliations of such investment adviser and of his or its partners, officers, directors, and persons performing similar functions and of any controlling person thereof;

(C) the nature of the business of such investment adviser, including the manner of giving advice and rendering analyses or reports;

(D) the nature and scope of the authority of such investment adviser with respect to clients' funds and accounts;

(E) the basis or bases upon which such investment adviser is compensated; and

(F) whether such investment adviser, or any partner, officer, director thereof, or any person performing similar functions, or any person directly or indirectly controlling or controlled by such investment adviser, is subject to any disqualification which would be a basis for denial, suspension, or revocation of registration of such investment adviser under the provisions of subsection (d), and

(2) a statement as to whether the principal business of such investment adviser consists or is to consist of acting as investment adviser and a statement as to whether a substantial part of the business of such investment adviser consists or is to consist of rendering investment supervisory services.

Except as hereinafter provided, such registration shall become effective thirty days after receipt of such application by the Commission, or within such shorter period of time as the Commission may determine. Any amendment of an application filed not more than fifteen days after the filing of such application shall be deemed to have been filed with and as a part of such application. Any amendment of an application filed more than fifteen days after the filing of such application and before such application becomes effective shall be deemed a new application incorporating by reference the unamended items of the earlier application. Any amendment filed after the application has become effective shall become effective thirty days after the filing thereof, or at such earlier date as the Commission may order.

(d) The Commission shall, after appropriate notice and opportunity for hearing, by order deny registration to, or suspend for a period not exceeding twelve months or revoke the registration of, an investment adviser, if he finds that such denial, suspension or revocation is in the public interest and that (1) such investment adviser, whether prior or subsequent to becoming such, or (2) any partner, officer or director thereof, or any person performing similar functions, or (3) any person directly or indirectly controlling or controlled by such investment adviser, whether prior or subsequent to becoming such, (A) has willfully made or caused to be made in any application for registration or report filed with the Commission under this subchapter, or in any proceeding before the Commission with respect to registration, any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or who has omitted to state in any such application or report any material fact which is required to be stated therein; or (B) has been convicted within ten years preceding the filing of the application or at any time thereafter of any felony or misdemeanor which the Commission finds (i) involves the purchase or sale of any security, (ii) arises out of the conduct of the business of a broker, dealer, or investment adviser, (iii) involves embezzlement, fraudulent conversion, or misappropriation of funds or securities, or (iv) involves the violation of section 1341, 1342, or 1343 of Title 18, as heretofore or hereafter amended; or (C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, or dealer, or as an affiliated person or employee of any investment company, bank, or insurance company, or from engaging in or continuing any conduct or practice in connection with

any such activity, or in connection with the purchase or sale of any security; or (D) has willfully violated any provision of the Securities Act of 1933, or of the Securities Exchange Act of 1934, or of this subchapter, as any of such statutes heretofore have been or hereafter may be amended, or of any rule or regulation under any of such statutes; or (E) has aided, abetted, counseled, commanded, induced, or procured the violation of any other person of the Securities Act of 1933, or the Securities Exchange Act of 1934, or of this subchapter, as any of such statutes heretofore have been or hereafter may be amended, or of any rule or regulation under any of such statutes.

(e) The commencement of a proceeding to deny registration under this section shall operate to postpone the effective date of registration for a period of ninety days, or until final determination whether such registration shall be denied if that determination is made within such ninety-day period; but if, after appropriate notice and opportunity for hearing, it shall appear to the Commission to be necessary or appropriate in the public interest or for the protection of investors to postpone the effective date of such registration beyond such ninety-day period and until final determination of whether such registration shall be denied, the Commission shall so order. Upon request of any interested party, made more than ninety days after the effective date of such order, the Commission shall consider whether such postponement should continue, and shall take such action, if any, with respect thereto as in its discretion is necessary or appropriate in the public interest or for the protection of investors.

Appendix B

54 Stat. 852 (1940)

15 U. S. C. Sec. 80b-4

Every investment adviser who makes use of the mails or of any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser (other than one specifically exempted from registration pursuant to section 80b-3 (b) of this title), shall make, keep, and preserve for such periods, such accounts, correspondence, memorandums, papers, books, and other records, and make such reports, as the Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors. Such accounts, correspondence, memorandums, papers, books, and other records shall be subject at any time or from time to time to such reasonable periodic, special, or other examinations by examiners or other representatives of the Commission as the Commission may deem necessary or appropriate in the public interest or for the protection of investors.

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54 Stat. 853 (1940)

15 U. S. C. Sec. 80b-9(a)(b)(c)(e)

(a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this subchapter or of any rule or regulation prescribed under the authority thereof, have been or are about to be violated by any person, it may in its discretion require, and in any event shall permit, such person to file with it a statement in writing, under oath or otherwise, as to all the facts and circumstances relevant to such violation, and may otherwise investigate all such facts and circumstances.

(b) For the purposes of any investigation or any proceeding under this subchapter, any member of the Commission or any officer thereof designated by it is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which are relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in any State or in any Territory or other place subject to the jurisdiction of the United States at any designated place of hearing.

(c) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who without just cause shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to

do, in obedience to the subpoena of the Commission, shall be guilty of a misdemeanor, and upon conviction shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(e) Whenever it shall appear to the Commission that any person has engaged, is engaged, or is about to engage in any act or practice constituting a violation of any provision of this subchapter, or of any rule, regulation, or order hereunder, or that any person has aided, abetted, counseled, commanded, induced, or procured, is aiding, abetting, counseling, commanding, inducing, or procuring, or is about to aid, abet, counsel, command, induce, or procure such a violation, it may in its discretion bring an action in the proper district court of the United States, or the proper United States court of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this subchapter or any rule, regulation, or order hereunder. Upon a showing that such person has engaged, is engaged, or is about to engage in any such act or practice, or in aiding, abetting, counseling, commanding, inducing, or procuring any such act or practice, a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning any violation of the provisions of this subchapter, or of any rule, regulation, or order thereunder, to the Attorney General, who, in his discretion, may institute the appropriate criminal proceedings under this subchapter.

Appendix B

54 Stat. 855 (1940)

15 U. S. C. Sec. 80b-11(a)

(a) The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the functions and powers conferred upon the Commission elsewhere in this subchapter. For the purposes of its rules or regulations the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters.

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54 Stat. 856 (1940)

15 U. S. C. Sec. 80b-15

(a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this subchapter or with any rule, regulation, or order thereunder shall be void.

(b) Every contract made in violation of any provision of this subchapter and every contract heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of any provision of this subchapter, or any rule, regulation, or order thereunder, shall be void (1) as regard the rights of any person who, in violation of any such provision, rule, regulation, or order, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision.

Appendix B

54 Stat. 857 (1940)

15 U. S. C. Sec. 80b-17

Any person who willfully violates any provision of this subchapter, or any rule, regulation, or order promulgated by the Commission under authority thereof, shall upon conviction, be fined not more than $10,000, imprisoned for not more than two years, or both.

Regulations Under Investment Advisors Act of 1940

26 F. R. 10549

Reg. Sec. 275.206(4)-1

ADVERTISEMENTS BY INVESTMENT ADVISERS

(a) It shall constitute a fraudulent, deceptive, or manipulative act, practice or course of business within the meaning of Section 206(4) of the Act, for any investment adviser, directly or indirectly, to publish, circulate or distribute any advertisement:

(1) which refers, directly or indirectly, to any testimonial of any kind concerning the investment adviser or concerning any advice, analysis, report or other service rendered by such investment adviser.

APPENDIX C

To: The Honorable Judges of the Court
of Appeals for the Second Circuit

Re: SEC v. Wall Street Transcript
Appeal No. 33350

This memorandum is submitted pursuant to leave granted on the oral argument of the appeal in the above-entitled proceeding held on November 17, 1969. A copy of this memorandum has been mailed to counsel for the SEC.

On page 9 of the SEC's reply brief the SEC attempts to distinguish the Transcript from what it calls "self-evidently a newspaper". The material set forth in brackets below is outside of the record; to the extent underlined the material is untrue; to the extent that bracketed material is not underlined the Transcript does not know whether it is true or untrue. Irrespective of what the fact is, the matter set forth by the SEC on page 9 of its brief is both legally and constitutionally irrelevant, and cannot be utilized to test the constitutionally protected privileges of the press.

> "*The Transcript lacks most of the conventional indicia of newspapers.* There is, among other things, the amount of its subscription charge which, [while not unusual in the investment advisory field, is *unprecedented in the newspaper business. It apparently has no reporters, except for the part-time services of Mr. Holman; it neither generates the information which fills its pages nor subscribes to or uses the wire services which provide information for newspapers.*]"

Appendix C

The facts with respect to the material quoted above from page 9 of the SEC's brief are as follows:

1. The Transcript lacks none of the conventional [if there is such a thing] indicia of newspapers.

2. The Transcript's $180 per year subscription price is not unprecedented in the newspaper business.

3. The Transcript has reporters, including Mr. Holman who works full time. The Transcript shows on its face that it has reporters other than Mr. Holman.

4. If the SEC means by the term "generates" that the Transcript creates the news it prints, then the Transcript and every other newspaper in America must plead guilty for no newspaper creates, or is supposed to create, its news. If the SEC means by the term "generates" to gather and report the news (which it must mean) the Transcript and every other newspaper does precisely that.

5. The Transcript utilizes two wire services.

The material set forth in footnote 12 on page 10 is outside of the record with the exception of the date on which the Transcript began publication. Indeed, for close to a year before the service of the subpoena, the Transcript in every issue ran an editorial or editorials. In fact, however, editorials were virtually unknown prior to 1791 and are really a product of the nineteenth century. The use or non-use of editorials is thus legally and constitutionally irrelevant.

The material set forth on page 15 as follows, is outside of the record:

> "As we have previously noted, however, the Wall Street Transcript did not begin to publish editorials against the Commission until after it was served with the Commission's subpoena."

This is not to say that only the matters set forth above are outside of the record or are untrue. These, however, exemplify liberties which the SEC has taken in its briefs.

In view of the questioning by the Court yesterday, I have inquired into a matter which appeared to interest the Court. I am authorized to state that the Transcript does *not* receive, directly or indirectly, any compensation whatsoever from any source for reporting and printing any matter or for positioning it in the newspaper. The Transcript, like any other newspaper, prints and positions the matters in accordance with what the editors think is of interest to the reading public.

Again the question of whether or not the Transcript receives compensation for printing and positioning the information is legally and constitutionally irrelevant. The press is still the press irrespective of whether it accepts compensation for printing information. The motives of the press may not, under the First Amendment, be the subject of inquiry. *Near* v. *Minnesota*, 283 U.S. 697, 721 (1930). A "compensated journal" may be operating illegally but that does not in any way affect its First Amendment rights nor convert it into any investment adviser subject to the jurisdiction of this licensing statute.

If the Transcript can be investigated for purposes of ascertaining whether it is a "compensated" newspaper under this licensing statute, then so can every other segment of the press in America, including The New York

Times, The Wall Street Journal, The New York Daily News and Fortune Magazine.

The SEC argued at length in its reply brief and in oral argument that the Transcript failed to disclose the reasons why it printed any particular matter and whether or not it received compensation therefor. No segment of the press discloses such information. In any event so far as this licensing statute is concerned, that is legally and constitutionally irrelevant. *Near* v. *Minnesota*, 283 U.S. 697, 721 (1930).

If, of course, the press, including the Transcript, is receiving compensation from an issuer, underwriter or dealer, without fully disclosing the receipt and the amount thereof for the reporting and publishing of broker's reports or other matter, then the press may be violating Section 17(b) of the Securities Act of 1933, which is not a licensing statute. In such event, the SEC could probably investigate any segment of the press under Section 19(b) of the 1933 Act with respect to such specific transaction. However, such investigation could not go, as the present investigation seeks to do, to the right of the press to publish, but only as to whether or not the press has been guilty of a specific violation of a section of the 1933 Act which, as stated, is not a licensing statute.

The SEC says (ftn. 14 on page 11 of its reply brief) that if the Transcript's correspondence should reveal that individual advice was being rendered to subscribers this would bear heavily upon a determination of the Transcript's claim to be a bona fide newspaper. Of course, the fact is that no such advice is given and no claim is made that such advice is given. In any event, again, this is legally and constitutionally irrelevant on the issue of whether a publication, qua publication, is protected by the

First Amendment from this licensing statute. The New York Post apparently does precisely what the SEC says bears on whether a newspaper is bona fide. We assume that it is not compensated therefor, separately from the price of the newspaper, and hence what the Post apparently does is perfectly proper. Parenthetically, the notion of "bona fides", whatever that may mean, seems constitutionally impermissible.

The SEC repeats a similar contention in footnote 14 on page 12 of its reply brief. The reports are dated and thus a comparison of the date of the Transcript with the date of the report indicates the information which the SEC says it is seeking.

In sum, all of the information which the SEC says it is seeking under this licensing statute it could also seek with respect to every other newspaper or publication in America. All of the information which the SEC says it is seeking is constitutionally and legally irrelevant here.

Respectfully submitted,

Samuel N. Greenspoon
Pollack Greenspoon & Singer
Attorneys for Appellee

APPENDIX D

Excerpt from the June 1969 issue of The Institutional Investor

Good ideas come from good information. But how can you keep up with all the information?

		DAILY	WEEKLY & BI-WEEKLY	MONTHLY & BI-MONTHLY	QUARTERLIES	IRREGULAR PUBLICATIONS
1	essential	The Wall Street Journal New York Times Local Papers	Business Week Sunday Finance Sections, Major Papers Aviation Week Wall Street Transcript Time Newsweek U.S. News & World Report	The Institutional Investor Fortune Financial Analysts Journal		
2	highly desirable	Financial Times (London)	Forbes The Economist "Monetary Indicators" Stock Market Survey Science News	Harvard Business Review Scientific American Datamation Survey of Current Business Technology Review EDP Industry Report	Quarterly Financial Report for Manufacturing Corps	Science-fiction U.S. Industrial Outlook 1969
3	quite useful	Congressional Record	Financial Post (Toronto) Drew Odd Lot Studies Earnings Forecaster (Standard & Poor's) Lowry's Market Trend Analysis The Wall Street Letter	Oriental Economist Fed. Res. Dist. Bank Bulletins, espec. NYC, Phila. & St. Louis, First National, Chi., Citibank Econ. Letters Economic Indicators Bank Credit Analyst Samson Trends	Industrial Management Review Amer. Econ. Review OECD Publications	PhD Theses (unpublished) Publications of Stanford Research Inst. Rand Corp. Hudson Institute Project MAC (M.I.T.)
4	optional	Journal of Commerce Women's Wear Daily	Advertising Age Electronic News "West" Magazine (Los Angeles Times) Computerworld Electronics Nature (London)	Banking Ebony City magazines Finance Interavia Printers Ink Computers and Automation Medical Economics	Quarterly Journal of Economics Journal of Finance	OECD Publications

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1467

WALL STREET TRANSCRIPT CORPORATION
BY RICHARD A. HOLMAN, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–27a) is not yet officially reported. The opinion of the district court (Pet 28a–46a) is reported at 294 F. Supp. 298.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1970. The petition for a writ of certiorari was filed on April 23, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Securities and Exchange Commission may enforce through judicial proceedings a subpoena issued in an investigation to determine if a publication that reprints investment advice is an investment adviser under the Investment Advisers Act of 1940.

STATUTE INVOLVED

The pertinent provisions of the Investment Advisers Act of 1940 are set forth at Pet. App. 48a–58a.

STATEMENT

On November 22, 1968, the District Court for the Southern District of New York denied an application by the Securities and Exchange Commission for enforcement of a subpoena duces tecum directed to petitioner (App. 266a[1]) and on December 24, 1968, denied the Commission's motion for reargument or clarification (App. 274a). The court of appeals reversed these orders, noting that on remand the petitioner was of course "free to ask the district court for appropriate protective limitations" should "the production of materials sought by the Commission's subpoena * * * threaten any unusual disruption of * * * [petitioner's] normal operations * * *" (Pet. 20a).

The subpoena had been issued in connection with an investigation ordered by the Commission pursuant to Section 209(c) of the Investment Advisers Act ("Advisers Act") as to the facts and circumstances

[1] "App." refers to the appendix in the court of appeals.

relating to an apparent violation of Section 203, the registration provision of the Advisers Act, by the petitioner, the Wall Street Transcript Corporation. The subpoena directed Richard A. Holman, petitioner's principal operating officer, to appear and produce certain documents and records (App. 17a–19a, 79a–80a). The Commission had ordered the investigation in July 1967, after its staff had reported information to it tending to show that the Wall Street Transcript ("Transcript"), which petitioner publishes, was an investment advisory publication within the meaning of Section 202(a)(11) of the Advisers Act. Petitioner was not registered as an investment adviser (App. 16a).

The Transcript is published weekly and sold at $5 an issue or by subscription for $180 a year (App. 143a). The major portion of each issue is devoted to securities reports and analyses originally published by registered broker-dealers and investment advisers. It ostensibly prints them "in toto, without comment, states the name of the author of the information, and disclaims any advocacy thereof" (App. 97a–98a). The publication also contains some management speeches, company studies and other reports. Advertisements to sell the Transcript have appeared in the *Wall Street Journal*, the financial section of the *New York Times* and in *Barron's* (App. 90a). These advertisements have had headings such as "WHICH SHOULD YOU BUY—NOW?" (App. 142a), "ALL IN FULL ORIGINAL TEXT — BUY-SELL-HOLD-SWITCH RECOMMENDATIONS * * *" (App.

148a). Such headlines are frequently followed by an index of numerous companies as to which the Transcript has securities analyses and the advertisements conclude: "You'll be surprised how THE WALL STREET TRANSCRIPT can help you maximize your profit potential" (App. 150a).

On July 29, 1968, Holman, accompanied by counsel, appeared in response to the Commission's subpoena. After being advised of the nature of the Commission's investigation and being sworn, he refused either to answer any questions, other than to give his name, addresses and telephone numbers (App. 59a 67a–69a), or to produce the documents subpoenaed (App. 39a). Holman did not assert a privilege against self-incrimination, but based his refusal to comply with the subpoena on the grounds that the Commission's inquiry was not authorized by the Advisers Act and not permitted by the First and Fourth Amendments to the Constitution (App. 49a, 63a–64a).

ARGUMENT

The decision of the court of appeals was correct and does not conflict with decisions of this Court or of other courts of appeals. The constitutional issues raised are based primarily upon an erroneous characterization of the Investment Advisers Act as a statute authorizing "censorship" (Pet. 13–16) and upon an assumption of the very fact which the Commission's investigation seeks to discover—whether the petitioner's publication is a "bona fide newspaper" and thus within the statutory exemption therefor in Section 202(a)(11)(D). Since the statute involved has basically only disclosure and antifraud provisions, this case is

controlled by the holdings of this Court that an agency's statutory power to investigate possible violations of the laws it administers includes the power to determine whether the statute covers a particular entity. See, *e.g., Endicott Johnson Corp. v. Perkins,* 317 U.S. 501; *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186; *Federal Trade Commission* v. *Crafts,* 355 U.S. 9, *reversing per curiam* 244 F. 2d 882 (C.A. 9). As held in *Oklahoma Press,* there is no exception to this general rule because the object of the investigation may be a newspaper.

1. There is no element of censorship in the Investment Advisers Act. This Court has pointed out that this statute was "designed to eliminate certain abuses in the securities industry, abuses which were found to have contributed to the stock market crash of 1929 and the depression of the 1930's."[2] The Act regulates the business of providing investment advice by requiring the registration of persons in that business as a prerequisite to their use of the mails and channels of interstate commerce (Section 203(a)). Registration is effected by filing an application containing information set forth in Section 203(c) of the Act, which has been summarized as

> information concerning the adviser's name, form and place of organization; the location of its offices, the names and addresses of its partners, officers and directors; the number of its employees; the nature of its business; the nature and scope of its authority with respect to

[2] *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.,* 375 U.S. 180, 186 (footnote omitted).

> clients' funds and accounts; the basis of its compensation; any record with respect to convictions or injunctions involving securities; and the education and business affiliations for the past ten years of the adviser and any partners, officers, directors and controlling persons.[3]

Unless the Commission, after notice and opportunity for hearing, finds that some specified statutory disqualification is present and that, in addition, it is in the public interest to deny registration,[4] registration is automatically effective 30 days after the filing of the application.[5] The statutory grounds for denial of reg-

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[3] II Loss, *Securities Regulation* 1394 (2d ed. 1961), as supplemented V Loss, *Securities Regulation* 3511 (1969).

[4] Section 203(d).

[5] Section 203(c). This section also provides that the Commission can declare the registration effective within a shorter period of time.

Section 203(e) provides that the commencement of a proceeding to deny registration postpones the effective date of registration for a 90-day period or until final determination of the proceeding, whichever first occurs. It provides, however, that if

> after appropriate notice and opportunity for hearing, it shall appear to the Commission to be necessary or appropriate in the public interest or for the protection of investors to postpone the effective date of such registration beyond such ninety-day period and until final determination of whether such registration shall be denied, the Commission shall so order. Upon request of any interested party, made more than ninety days after the effective date of such order, the Commission shall consider whether such postponement should continue, and shall take such action, if any, with respect thereto as in its discretion is necessary or appropriate in the public interest or for the protection of investors.

The quoted language is apparently the only basis for petitioner's repeated contention that the "issuance of the license may be indefinitely deferred" (Pet. 12, 15–16).

istration (and for suspension or revocation of a registration that has become effective) all involve willful violations of the federal securities laws or otherwise require evidence of specific unlawful conduct by the proposed registrant or by certain affiliated persons.[6] The few substantive provisions of the Act, which are summarized in the margin,[7] are designed to eliminate

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[6] Essentially, registration may be denied, suspended or revoked upon findings that the adviser or an affiliated person (1) has filed false reports with the Commission under the Act; (2) has been convicted within ten years of any felony or misdemeanor involving either securities or mail fraud violations; (3) is permanently or temporarily enjoined by any court of competent jurisdiction from acting as, among other things, an investment adviser, underwriter, broker, or dealer; (4) has wilfully violated any provision of the Act or of the Securities Act or Securities Exchange Act; or (5) has aided, abetted or counseled such a violation by any other person. Section 203(d). Even if the Commission finds any one or more of these disqualifications is present, it may deny registration or suspend or revoke a registration already effected only if it also finds it is "in the public interest" to do so. *Ibid.*

[7] Section 205, 15 U.S.C. 80b–5, regulates the terms of advisory contracts an investment adviser may enter into.

Section 206, 15 U.S.C. 80b–6, enumerates certain transactions in which investment advisers may not engage. That section makes it unlawful for any investment adviser to employ any device, scheme or artifice to defraud any client or prospective client; to engage in any transaction, practice or course of business which operates as a fraud or deceit; to fail to disclose to a client that he is acting as broker for another person; or to engage in any act, practice, or course of business which is fraudulent, deceptive or manipulative. Pursuant to Section 206 (4), the Commission has promulgated rules governing advertisements by investment advisers and the custody or possession of funds or securities of clients.

Section 207, 15 U.S.C. 80b-7, makes unlawful any willful misstatement or omission of a material fact in any registration application or report required to be filed with the Commission.

fraudulent conduct and certain specific abuses found to have existed when the statute was enacted. In case of violations, the Commission may institute a proceeding to suspend or revoke registration (Section 203 (d)), may file an injunction action, or may transmit evidence of the violations to the Attorney General, who, in his discretion, may institute criminal proceedings (Section 209 (e)). Any final Commission order is subject to review in the courts of appeals (Sections 213(a) and 214).

The Commission has no authority under this statute to "license" investment advisers, other than its authority to deny, suspend, or revoke a registration on the basis of five specific objective criteria set forth in the statute (n. 6, *supra*). Contrary to the repeated suggestions in the petition (*e.g.*, Pet. 2, 12, 13, 18), the statute authorizes no prior review by the Commission of any oral or written utterances of any investment adviser, whether it be registered or unregistered.

2. Even if a constitutional issue might be presented if the term "bona fide newspaper" as used in the statutory exemption may be less inclusive than the term "press" contained in the First Amendment, the issue is not now ripe for review. Once the Commission's investigation has been completed, the Commission may conclude that the Transcript is a "bona fide newspaper" within the meaning of the statute; if not, the petitioner can raise its First Amendment issues if and when the Commission attempts to enjoin its operations or apply the other statutory sanctions. At that time these issues can then be determined on the basis

of a full and complete factual record. There is accordingly no occasion to determine them at this preliminary stage.

3. The investigation would have no "chilling effect" which would bring it within the scope of this Court's decision in *Dombrowski* v. *Pfister*, 380 U.S. 479, and other cases cited by petitioner. There is thus no justification for a departure from the presumption that Congress intended the agency, not the federal courts, initially to determine the coverage of the regulatory statute pursuant to which the subpoena is issued. In *Dombrowski*, for example, the state officials conducting the investigations under statutes of dubious validity, combined with publicity, had deliberately utilized their investigative authority, to throttle the social and political efforts of petitioners and had participated in an illegal seizure of "documents and records [that had] paralyzed operations and threatened exposure of the identity of adherents to a locally unpopular cause" (380 U.S. at 488–489). In the instant case, as the court of appeals intimated, the Commission has merely attempted to learn the facts about petitioner's business venture by subpoenaing petitioner in a private investigation rather than by making inquiries throughout the investment community, which conceivably might have had a damaging effect upon him (Pet. 19a).[8]

[8] Cf. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 150; *Breard* v. *Alexandria*, 341 U.S. 622, 642; *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178, 191; *Murdock* v. *Pennsylvania*, 319 U.S. 105, 110–111; *Martin* v. *City of Struthers*, 319 U.S. 141, 142 n.1; *Jamison* v. *Texas*, 318 U.S. 413, 417; *Valentine* v. *Chrestensen*, 316 U.S. 52.

The court of appeals properly found that the documentary material sought by the Commission in its investigation was relevant to the question whether the Act covers petitioner's activities and that the Commission's subpoena "does not differ in its effect * * *" from that enforced in the *Oklahoma Press* case, *supra* (Pet. 18a–19a, n.15). The court also made it clear that if during the course of the investigation the production of materials should "threaten any unusual disruption of the *Transcript's* normal operations" the district court may accord it "appropriate protective" remedies (Pet. 20a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PHILIP A. LOOMIS, Jr.,
General Counsel,

DAVID FERBER,
Solicitor,

THEODORE SONDE,
Assistant General Counsel,

HARVEY L. PITT,
Attorney,
Securities and Exchange Commission.

MAY 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970

Office-Supreme Court, U.S.
FILED
JUN 5 1970
EDWIN L. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1467

WALL STREET TRANSCRIPT CORPORATION
By Richard A. Holman,
Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

SAMUEL N. GREENSPOON
Counsel for Petitioner
201 East 42nd Street
New York, N. Y. 10017
212-867-0606

Of Counsel
SAMUEL N. GREENSPOON
HARRY KALVEN, JR.

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PETITIONER'S REPLY BRIEF

Preliminary

1. It is striking that respondent's brief does not address itself to the importance of the issues the petitioner requests this Court to review. In effect the respondent by its silence appears to concede that the serious questions herein, many of which are of first impression, should be reviewed by this Court. Some of these questions are listed herewith in summary form:

a) Presented here are questions of first impression as to the construction of the Investment Advisers Act of 1940 ("Act"), a major piece of federal legislation. These involve both the scope of the term "investment adviser" and the sweep of the statutory exclusion from the Act.

b) Grave and serious constitutional questions of novelty and complexity under the First Amendment are raised here. May the Act constitutionally impose the burden of *investigations* on every member of the press publishing financial or economic news or news concerning securities? May a licensing statute constitutionally be applied to the New York Times or the Transcript or for that matter to any member of the press? May Congress impose standards of fitness for those who work for the press? May Congress constitutionally condition publication, or use of the mails or interstate facilities, by the Transcript or any *member* of the press upon registration and licensing?

c) Serious questions are raised as to the meaning and effect of *Oklahoma Press Pub. Co.* v. *Walling*[1] upon which respondent heavily relies. Is the *Walling* principal limited, as this Court there indicated, to non-licensing statutes, or to statutes which do not involve exclusion from commerce of a newspaper of a non-conforming publisher, or to statutes which involve no restraint on expression? Or does *Walling* permit the agency to make the initial determination of jurisdiction as to any investigation under any statute, no matter its nature or constitutionality, as respondent here asserts?

2. It is again striking that respondent's brief does not try to answer the well reasoned opinions and findings of the District Court or of Judge Danaher. And it is

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[1] 327 U.S. 186 (1946).

even more striking that respondent does not even attempt to support the rationale or holding of the majority below, or to meet the issues raised in the petition.

3. It is again striking that respondent does not attempt to answer petitioner's argument and authorities under Questions 2 and 3 (Pet. pp. 18-26).

Its arguments as to Questions 1 and 4 (Pet. pp. 11-17) are the erroneous contentions that the Act is not a censorship statute and the constitutional issues raised therein are not ripe for review. The question of censorship will be discussed *infra*. As to ripeness the respondent is clearly wrong and misconceives what the case is all about.

First, the majority below squarely faced the constitutional issues and decided them against the petitioner. The majority sustained the constitutionality of the Act, both on its face and as the SEC seeks to apply it. As shown in the petition (pp. 11-21) that ruling is clearly wrong in all respects. But, as the majority below clearly understood, without a ruling of constitutionality the investigation could not continue.

Second, respondent completely ignores the First Amendment rights of the petitioner and in effect argues that investigations are not subject to the First Amendment. This Court has many times ruled to the contrary.[2]

4. The respondent suggests that at a later date when there is, in its term, "a full and complete factual rec-

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[2] *E.g.*, *Watkins* v. *United States*, 345 U.S. 178 (1957); *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957); *N.A.A.C.P.* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *De Gregory* v. *Attorney General of New Hampshire*, 383 U.S. 825 (1966).

ord", the time will come for a decision on the constitutional issues. Respondent suggests not one possible fact, not one piece of evidence, which is not now in the record and which could be utilized to flesh out the record or lay any basis for the contemplated investigation. There is no fact and there is no conceivable state of facts under which the Act—the core of which is licensing and censorship—could constitutionally be applied to the Transcript or to the press or under which the Transcript or any member of the press could be licensed under the Act as a condition to continued publication. Petitioner challenged the respondent (p. 17) to state any such facts and none has been stated.[3]

5. Respondent's statement of the question presented (br. p. 2) shows that the contemplated investigation has no legitimate purpose, and that there is here lacking any basis for any belief that the investigation will be productive. If the investigation is to determine whether a publication which "reprints investment advice" is an investment adviser under the Act, all one needs to do is read the publication. Respondent, although challenged on this point (Pet. p. 32), has been unable to suggest any reason why the publication itself is not the sole basis for such determination or why any investigation at all is necessary.[4] Indeed, virtually every newspaper "reprints investment advice" (116a-132a).

To permit the judgment to stand would be in Judge Danaher's words "to ensconce administrative absolutism at its unreachable zenith".

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[3] See *Mills* v. *Alabama*, 384 U.S. 214 (1966); *Cameron* v. *Johnson*, 381 U.S. 741 (1965).

[4] To quote Senator Hennings, "the best evidence" when dealing with a newspaper "is certainly the product itself". *Russell* v. *United States*, 369 U.S. 749, 774 (1962).

The Act Unconstitutionally Abridges Freedom of the Press

Respondent stresses at length its erroneous notion that the Act contains no element of "censorship" (br. pp. 5-8). Because of such stress, we add a few words on this point to the discussion in the petition.

Respondent's brief is predicated on the contentions that (br. pp. 4-5), "The statute involved has basically only disclosure and anti-fraud provisions"; that (br. pp. 7-8) the Act is designed to eliminate "fraudulent conduct" and similar abuses; and that (br. p. 5), "There is no element of censorship in the Investment Advisers Act".

The respondent is wrong on all points. Indeed, it has retreated, from the views expressed by the majority below. The majority said (Appendix A *infra*, p. 8a):

> "The *core of the Act* is its registration provision §203, which renders it unlawful for a non-registered investment adviser to make use of the mails or any instrumentality of interstate commerce in connection with his business." (Emphasis supplied.)

With the exception of the registration provisions of the Act, and the provisions which supplement and provide penalties for non-registration, there is nothing new in the Act. The fraudulent conduct and other abuses proscribed in the Act were already unlawful under the Securities Act of 1933 and the Securities Exchange Act of 1934, neither of which conditions publication on licensing.[5]

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[5] Section 17 of the Securities Act of 1933, 15 U.S.C. Sec. 77q; Sections 9 and 10 of the Securities Exchange Act of 1934, 15 U.S.C. Secs. 78i and 77j.

The only real purpose and the core of the Act are the registration provision and the substantive provisions relating to failure to register. In blunt terms, the Act is a licensing statute.

The respondent's play on the word "censorship" is of no consequence. The issue here is unconstitutional abridgement of freedom of the press in all of its iniquitious forms. Contrary to respondent's suggestion, a requirement that material be cleared in advance by a censor (cf. respts. br. p. 8) is not the only means of unconstitutionally abridging freedom of the press. Licensing, injunctions against future publication, prior restraints on the publisher or on the publication, all unconstitutionally abridge freedom of the press and all are censorship and this Court has so held.

First, compulsory registration as a condition to utilization of the mails or interstate facilities unconstitutionally abridges freedom of the press and constitutes censorship and prior restraint in an extreme form.[6]

Second, the SEC may indefinitely defer action upon any application for registration without any possible recourse to the Courts. The Act is perfectly clear on this point.[7] Such statutory authorization for indefinite deferment of an application for registration, without recourse to the Courts, abridges freedom of the press and is prior re-

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[6] *Speiser* v. *Randall*, 357 U.S. 513 (1958); *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146 (1946); *Martin* v. *City of Struthers*, 319 U.S. 141 (1943); *Largent* v. *Texas*, 318 U.S. 418, 422 (1942); *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938); *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

[7] Section 203e of the Act, 15 U.S.C. Sec. 80b-3e.

straint and censorship utterly repugnant to the Constitution.[8]

Third, contrary to respondent (cf. br. pp. 6, 8) the SEC may deny, suspend or revoke a registration on the basis of criteria not specifically set forth in the statute. Respondent (br. p. 7, fn.6) has set forth, in misleading part, grounds for revocation, suspension or denial of registration. Respondent did not set forth that the SEC may deny, revoke or suspend registration for violation of *any rule* or *regulation* promulgated by the SEC under the Securities Act of 1933, the Securities Exchange Act of 1934, or the Act.[9]

Fourth, a specific prior restraint adopted by the SEC authorizes suspension, revocation or denial of registration. Section 275.206(4)-1 of the regulations (Appendix B infra p. 58a) prohibits the publication of any advertisement which contains any testimonial. The absolute prohibition of any testimonial constitutes censorship more extreme than prior submission of the testimonial for clearance.

In any event, it is constitutionally irrelevant what the conditions to the registration are or whether only publishers who have committed serious offenses are barred from registration. The mere fact of compulsory registration as applied to the Transcript or any other newspaper is enough.

> "It is not the sporadic abuse of power by the censor but the pervasive threat of its very existence that constitutes the danger to freedom of discussion. One who might have had a license for the asking

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[8] *Freedman* v. *Maryland*, 389 U.S. 51 (1965); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964); *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478 (1962); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940).

[9] Section 203e of the Act, 15 U.S.C. Sec. 80b-3e.

may therefore call into question the whole scheme of licensing . . ." [10]

In addition, all of the evils which this Court struck down in *Near* v. *Minnesota ex rel. Olson*[11] are present in this Act. The Act authorizes injunctions against the use of the mails or of interstate facilities of the publications of any unregistered publisher. On the basis of any one issue, all subsequent issues of the publisher may be enjoined and any further publication is punishable as a contempt. As this Court has ruled "This is of the essence of censorship.[12]

If registration can constitutionally condition use of the mails and interstate facilities by any member of the press which publishes financial or economic or business news, then it can constiutionally condition such use by a church or by any person no matter what the subject matter of the utterance may be. Today it is economic or financial or business news that is licensed, tomorrow it is church news, and the day after it is any kind of news which Congress may choose to interdict.

Our research has failed to disclose any attempt (other than at bar), since the adoption of the Bill of Rights, by the United States or by any State to require publishers to register with any government body as a condition to publication. Indeed, registration was the method utilized

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[10] *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940). The government conceded in *Russell* v. *United States*, 369 U.S. 749, 777 (1962) that "Congress would have no power to establish standards of fitness for those who work for the press". But that is what Congress has done here if the Act applies to the press.

[11] 283 U.S. 697 (1931).

[12] *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931).

in early colonial days to control the press. The early colonial press was printed "by authority" and it was James Franklin who "unshackled" it by printing "his paper not 'by authority', but in spite of it.[13]

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

SAMUEL N. GREENSPOON
Counsel for Petitioner
201 East 42nd Street
New York, New York 10017
(212) 867-0606

Of Counsel
SAMUEL N. GREENSPOON, ESQ.
HARRY KALVEN, JR., ESQ.

[13] Emery, The Press and America, p. 49 (2d Ed. 1962), Library of Congress Catalog Card No.: 62-15294.